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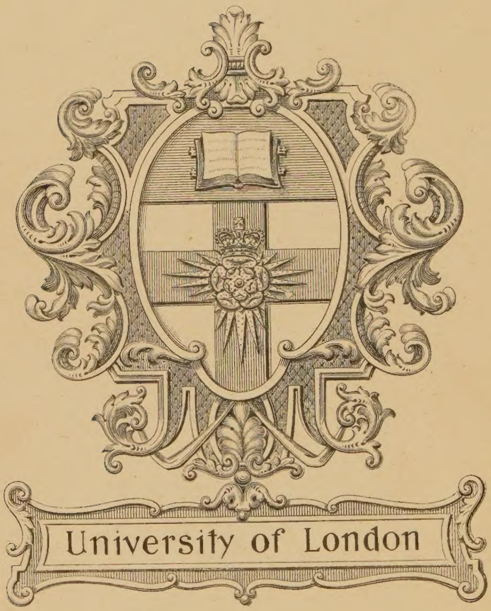
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

THE KING *v.* SALFORD ASSESSMENT COMMITTEE.

Ex parte OGDEN.

C. A.

1937

Feb. 12; *March* 1.

Rating—Proposal to amend valuation list—Objection to proposal by rating authority before assessment committee—Appointment of officer of rating authority as acting clerk to assessment committee—Validity —Bias—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 55, *sub-s.* 1; *Sch. I., cl.* 12; *Sch. IV., Part III., cl.* 4—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

An officer of a rating authority, whose duty was to attend the meetings of the rating committee for the purpose of taking minutes of their proceedings, and so would obtain knowledge of all the transactions of the rating authority, was appointed by the assessment committee for that area acting clerk to that committee, and would have to advise the assessment committee upon matters of procedure. The assessment committee would have to consider an objection by the rating authority to a proposal to amend the valuation list. An application was made to prohibit the assessment committee from acting on the resolution appointing

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REX
v.
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ASSESSMENT
COMMITTEE.

OGDEN,
Ex parte.

the officer acting clerk to the assessment committee and also from acting upon a resolution directing him to remain in attendance on the committee during the hearing of the objection to the appellant's proposal to amend the valuation list and the deliberations of the committee thereon on an allegation of liability to suspicion of bias. The Divisional Court held that the appointment was valid :—

Held, on appeal, by Slesser L.J. and Luxmoore J., Greene L.J. dissenting, that the assessment committee should be prohibited from allowing the officer to remain in attendance on that committee during the hearing of the appellant's objections and proposal and during the subsequent deliberations thereon, on the ground that the assessment committee in hearing objections to the draft valuation list under s. 27 of the Rating and Valuation Act, 1925, was a body performing judicial or quasi-judicial functions, and that if the officer were present at the meeting of the assessment committee when this objection and proposal were being heard, and advised that committee on procedure, it would be impossible to hold that it was a case where justice appeared manifestly and undoubtedly to be done.

Decision of the Divisional Court [1936] 2 K. B. 626 reversed.

APPEAL from a decision of the Divisional Court upon a rule nisi for prohibition. (1)

The rule called upon the Salford assessment committee to show cause why a writ of prohibition should not issue to prohibit them from acting on a resolution dated June 26, 1935, in the manner shown by their resolution of January 15, 1936.

The resolution of June 26, 1935, was to the effect that "Pending the appointment of a clerk to the committee Mr. Brown of the town clerk's department be appointed as acting clerk to the committee." The resolution of January 15, 1936, was that Mr. Brown "remain in attendance upon the committee during the whole of the meeting." The actual position with regard to Mr. Brown was stated in his affidavit of April 17, 1936, to the effect that he had been employed by the council of the City of Salford for thirty-four years last past and had been engaged in the administrative section of the town clerk's department. In addition to other work he had since January 26, 1935, also acted as clerk to the assessment committee for the assessment area of the City of Salford, and in that capacity, among other matters, he advised them of the proper procedure and made the proper entries in the valuation lists of the amendments authorized by the decisions of the committee, but took no part in the decisions of the committee.

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(1) [1936] 2 K. B. 626.

His other activity, which had given rise to the present proceedings, was that as part of the duties of a committee clerk he attended meetings of the rating committee to whom the council had delegated its duties with respect to the preparation of the valuation lists, for the purpose, as part of his duties, of taking the minutes of their proceedings; but apart from merely recording such proceedings, he was not in any way concerned with their decisions and took no part therein in advising or otherwise.

Mr. Charles Ogden, on whose motion the rule nisi was obtained, was the owner and co-occupier of cinemas and a billiard hall, and, by affidavit, alleged that on October 14, 1933, a draft valuation list of the rating area of Salford was made by the rating committee, and on November 10, 1933, Mr. Ogden objected thereto; and, apart from his objections, on February 12, 1935, he proposed on behalf of himself and a co-occupier an amendment to the valuation list in respect of the billiard hall.

On February 14, 1935, the Salford Council, as the rating authority, gave notice to him of objection to his proposal to amend his valuation, and after considerable correspondence and discussion, on the matter coming before the assessment committee on January 15, 1936, to hear the objection of the rating committee, the solicitor, on behalf of Mr. Ogden (who had previously given notice of his intention on January 2, 1936), objected to the acting clerk, Mr. Walter Brown, being present, and on the deputy town clerk, on behalf of the rating authority, stating there was no legal objection to Mr. Brown carrying out the duties of clerk to the assessment committee, the solicitor stated he had received a letter from the town clerk relating to the rating of cinemas, and asked for an adjournment to which the assessment committee finally agreed, and the proceedings still stood adjourned. The rule nisi was granted on March 2, 1936.

The grounds of the rule were (i.) that the resolution was ultra vires and against the provisions of Sch. I., cl. 12, and Sch. IV., Part III., cl. 4, of the Rating and Valuation Act, 1925 (1); (ii.) that Mr. Brown was so related to the Salford rating authority, which was the party appearing in opposition to the applicant, Charles Ogden, on a proposal by him to amend the valuation list, as to be unfit to occupy the position of acting clerk to the assessment committee; and (iii.) that it might reasonably be expected that Mr. Brown had a real bias, and that justice would not appear to be done if he acted as such clerk.

The Divisional Court held that the appointment was valid, and discharged the rule nisi for prohibition.

The applicant, Charles Ogden, appealed.

Michael E. Rowe for the appellant. The point in the present case is whether a certain person, Brown, who is an officer of the Salford city council, which is the rating authority, is a proper person to be appointed clerk to the assessment committee. In a borough the rating authority is the borough

(1) Rating and Valuation Act, 1925, s. 55, sub-s. 1: "It shall be lawful for rating authorities, assessment committees, and county valuation committees to appoint for the purposes of this Act such rating officers, valuation officers and other officers as they think fit. . . . ."

Sch. I., cl. 12: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment as a member of the assessment committee, and no authority shall appoint or nominate as its representative on an assessment committee any person who is an officer of the authority. . . . ."

Sch. IV., Part III., cl. 4: "No person, being either a party to the objection, or a witness in the case, or a valuer employed by the assessment committee, shall be present while the assessment committee are considering their decision on an objection."

Local Government Act, 1929, s. 15, sub-s. 1 (replacing s. 17, sub-s. 3, of the Act of 1925): "In the case of an assessment area being a county borough, the assessment committee shall consist of such number of persons to be appointed by the council of the borough as may be determined by the council, but not less than one-third of the members of the committee shall be persons who are not members of the council, and if any member of the committee not being a member of the council becomes a member thereof, his term of office as a member of the committee shall thereupon expire."

council, and the assessment committee for that assessment area consists to a large extent of persons who are members of the borough council, and the question is whether the assessment committee can appoint as its clerk an officer of the borough council. The Salford assessment committee consists as to two-thirds of its members of persons who are members of the city council. Sect. 55, sub-s. 1, of the Rating and Valuation Act, 1925, enables rating authorities and assessment committees to appoint such officers as they think fit. The Divisional Court placed considerable reliance upon that section as giving the assessment committee power to appoint any one they thought fit as their clerk. Rule 12 of Sch. I. to the Rating and Valuation Act, 1925, prohibits any person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation lists are delegated from being qualified for appointment as a member of the assessment committee, and also prohibits a rating authority from appointing one of its officers as its representative on an assessment committee. That rule only applies to members of assessment committees and therefore does not apply here, because Brown is not a member of the assessment committee. But the rule shows that an officer of the Salford city council could not be a member of the assessment committee on the ground of bias. Rule 4 of Sch. IV., Part III., prohibits a person who is a party to an objection from being present while the assessment committee are considering their decision on the objection. The rating authority in this case objected to Ogden's proposal to amend the valuation list and therefore is a party to the objection. An officer of the rating authority is part of the objectors, and is therefore a party to the proceedings. The town clerk usually appears for the rating authority before the assessment committee. He cannot be present when the assessment committee are considering their decision with regard to the objection. As Mr. Brown is in the town clerk's department it is difficult to see that he would not be subject to bias. In London under s. 18 of the Local Government Act, 1929, the town clerk is to be the clerk of the assessment committee.

But the provisions as to rating in London are quite different from those in force in the provinces. Rule 14, sub-r. 1, of the Rating and Valuation Act (Assessment Appeals) Rules, 1927, provides that "In any case where the clerk is also an officer of any authority or committee which is a party to an appeal, the chairman of the Court or the Recorder, as the case may be, shall appoint some independent person, being a barrister or a solicitor, to act in lieu of the clerk upon the hearing by the Court of such appeal. . . . ." That indicates that officers of any authority which is a party to an appeal ought not to be put in a position where they can exercise any influence. In *Rex* v. *Sussex Justices. Ex parte McCarthy* (1) the acting clerk to justices was a member of the firm of solicitors who were engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted the applicant without consulting the acting clerk. The Divisional Court, however, quashed the conviction. Lord Hewart C.J. said (2): "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." The principle which was there applied to a clerk to justices equally applies to persons acting in a quasi-judicial position. In *Rex* v. *North East Surrey Assessment Committee. Ex parte F. W. Woolworth & Co.* (3) it was held that the county valuation officer, as having a possible interest, was disqualified from being present with the assessment committee while they were considering their decision. Avory J. said (4): "I think that Mr. Lake, being in the position of county valuation officer, might reasonably be suspected by ratepayers and persons appearing before the assessment committee of having a real bias in

(1) [1924] 1 K. B. 256.
(2) Ibid. 259.
(3) [1933] 1 K. B. 776.
(4) Ibid. 786.

regard to a question of the valuation of premises within the county." Those observations might equally apply to a person acting as clerk to the assessment committee. Lord Hewart C.J. said in *Rex* v. *North Worcestershire Assessment Committee. Ex parte Hadley* (1) that an assessment committee is "a body of persons having legal authority to determine questions affecting the rights of subjects, and, secondly, to the extent to which it has and is performing that duty, it has, I think, the duty to act judicially." In *Middlesex County Valuation Committee* v. *West Middlesex Assessment Committee* (2) it was held that a valuation committee has a right to send its valuation officer to attend the meetings of the assessment committee for the purpose of informing himself of what takes place at those meetings, but that the valuation officer cannot participate in the decisions of the assessment committee. Lord Wright M.R. there said (3): "The decision which the assessment committee are arriving at is the decision of the committee itself. The county valuation committee have nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body. It would be most improper, on general principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision." That is a further acknowledgment of the principle that no one who is suspected of having an interest in the decision should be present while it is being arrived at. The Rating and Valuation Act, 1925, provides that any one who has taken part in the preparation of the valuation list shall not be present at the deliberations of the assessment committee on their decision with regard to it. The Divisional Court considered that inasmuch as two-thirds of the members of the assessment committee were members of the rating authority and therefore might be considered as being biassed the fact that a person was appointed as clerk to the assessment committee who might also be biassed did not make much

(1) [1929] 2 K. B. 397, 406.
(2) [1937] 1 Ch. 361.
(3) [1937] 1 Ch. 376.

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difference, but if the members of the assessment committee are biassed it is all the more reason why that bias should not be increased.

[SLESSER L.J. The most you can ask for is an order prohibiting Mr. Brown acting under the resolution of January 15. The only thing we are considering is whether that resolution requiring Mr. Brown to attend at the particular meeting at which Mr. Ogden's proposal to amend the valuation list was considered was valid. If the rule is made absolute there will be nothing to prevent Mr. Brown attending as clerk to the assessment committee at any meeting other than that at which Mr. Ogden's application was considered. You do not now contend that the assessment committee cannot appoint as clerk any person they think fit ?]

That is so. The objection to Mr. Brown is not merely to his presence at the deliberations of the assessment committee but also to his presence during the hearing of the application. In *Rex* v. *Essex Justices. Ex parte Perkins* (1) a solicitor was clerk to justices and left his business at a branch office almost entirely to a clerk. A lady consulted the clerk about the preparation of a deed of separation from her husband. Subsequently the lady took out a summons for maintenance against her husband upon the hearing of which the solicitor acted as clerk to the justices. An order was made by the justices against the husband. The Divisional Court made absolute a rule for certiorari to quash the order. Avory J. (2) applied the dictum of Lord Hewart C.J. in *Rex* v. *Sussex Justices. Ex parte McCarthy* (3) that it " is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done " and he added : " I think that in that sentence the words ' be seen ' must be a misprint for the word ' seem.' " Mr. Brown acted as clerk to the rating committee. That committee must have discussed Mr. Ogden's proposal to amend the valuation list. Mr. Brown may have attended that meeting. He does not deny having done so. In those circumstances he is not a proper person to advise the assessment committee while they are hearing and determining Mr. Ogden's application. He comes within the word "party" in r. 4 of Sch. IV., Part III., to the Act of 1925 as being the clerk to the rating authority, and therefore is prevented by that rule from being present while the assessment committee are considering their decision.

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(1) [1927] 2 K. B. 475.
(2) Ibid. 488.
(3) [1924] 1 K. B. 256, 259.

Erskine Simes for the respondents, the Salford assessment committee. The decision of the Divisional Court was correct. There was a misunderstanding as to the functions which Mr. Brown had to fulfil. The ground of the objection to Mr. Brown acting as clerk to the assessment committee is that he is an officer in the employ of the rating authority, which is a party to the appeal; but inasmuch as the rating authority is a party to every rating appeal the case is one of general importance. The rule seeks two things, one, to prohibit the assessment committee from acting upon their resolution of June 26, 1935, appointing Mr. Brown as acting clerk to the committee, and secondly from acting on their resolution of January 15, 1936, requiring Mr. Brown to remain in attendance upon the committee during the whole of the meeting.

[SLESSER L.J. The application is now limited to the validity of the resolution of January 15, 1936. The only point before us is whether Mr. Brown was properly present at the meeting of the assessment committee when Mr. Ogden's application was being considered.]

When one looks at the Act of 1925 there is no room for the application of the common law doctrine of bias to assessment committees. Rule 11 of Sch. I. provides that "a member of an assessment committee shall not be qualified to act on the hearing or determination of or otherwise in connection with any matter relating to any hereditament in which he is interested as owner, occupier, or otherwise." That marks the extreme length to which the Legislature has gone in disqualifying a member of an assessment committee from sitting. The word "otherwise" in the sentence "interested as owner, occupier, or otherwise" must be construed as referring to an interest ejusdem generis with the interest of an owner or occupier: see *Rex* v. *North Worcestershire Assessment Committee. Ex parte Hadley.* (1) The disqualification in that rule would clearly have been a common law disqualification. An assessment committee has the power under s. 41 of the Act of 1925 to require the owner or occupier of any hereditament to make returns, the committee has the power under s. 55 to appoint valuers, and under s. 27, sub-s. 2, an assessment committee may, on the revision of the draft list, make such alterations, corrections and insertions in the list as they think proper, and a person aggrieved by any alteration, insertion or correction may lodge an objection with the assessment committee.

[SLESSER L.J. It is stated in Stone's Justices' Manual, 69th ed., p. 185, that "a justice should refrain from taking part in any matter in which he is individually interested, or where he is nearly related to either party."]

The Act of 1925 provides a complete code with reference to assessment committees, and sets out the persons who are not qualified to sit thereon and those who may sit, and the occasions when they may or may not act. There are no provisions in the Act dealing with disqualification arising from relationship. Avory J. said in *Rex* v. *North Worcestershire Assessment Committee. Ex parte Hadley* (2): "In view of the fact that they may make those alterations [under s. 27, sub-s. 2, of the Act of 1925], and would of necessity themselves have afterwards to decide upon any objection which might be made to their own alterations, it seems to me that there might be a difficulty in holding that members of that assessment committee were disqualified on the grounds which are commonly described as common law grounds of bias." Sect. 31, sub-s. 11, of the Act of 1925 contains provisions as to the disqualifications of justices on appeals from decisions of an assessment committee to quarter sessions.

[SLESSER L.J. The fact that there are specific disqualifications mentioned in the Act does not get rid of the common law disqualifications, including that of bias.]

The cumulative effect of the provisions of the Act shows

(1) [1929] 2 K. B. 397, 408.

(2) Ibid. 397, 415.

that the Act was intended to lay down exhaustively the disqualification from sitting on an assessment committee.

There is no obligation upon a rating authority to appoint a rating committee, but there is an obligation upon a rating authority to appoint some of its members to sit on the assessment committee. It would be absurd to say that although an assessment committee may consist as to three-fourths of its members of members of the rating authority and not be biassed yet if a clerk to a committee of the rating authority is appointed as clerk to the assessment committee he will be biassed. The information which a clerk to a committee of the rating authority would thereby obtain is very little more than what any member of the assessment committee who was also a member of the rating authority could obtain under s. 60, sub-s. 1, of the Act of 1925, under which very wide powers of inspection of documents are given to ratepayers.

Michael Rowe replied.

Cur. adv. vult.

March 1. The following judgments were read :—

Slesser L.J. This is an appeal from an order of a Divisional Court discharging a rule nisi for a writ of prohibition to prohibit the Salford assessment committee from acting on a resolution dated June 26, 1935, in the manner shown by their resolution of January 15, 1936.

[His Lordship then stated the facts set out above and continued :] It appears from the judgments in the Court below and the nature of the argument therein that the case for Mr. Ogden was put on a very much wider basis in the Court below than was the case before us. In the language of Lord Hewart C.J. (1) : The point of substance there was "that it is complained that Mr. Brown has been appointed by the Salford assessment committee to be acting clerk of that committee notwithstanding the fact that he is an officer employed in the town clerk's department of the city council. The argument is based upon two grounds. It is said, first,

(1) [1936] 2 K. B. 626, 628.

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that holding the position he does this gentleman comes within statutory prohibitions. Secondly, it is said that however that may be his appointment is likely to give rise to a suspicion of bias if he occupies this two-fold appointment." The Lord Chief Justice points out in his judgment that as regards the allegation of bias, the Rating and Valuation Act, 1925, which contains the machinery for rating, contemplates that two-thirds of the members of the assessment committee are themselves to be members of the rating authority, and that by s. 55, sub-s. 1, it is made lawful for rating authorities and assessment committees to appoint such rating officers and other officers as they think fit. Goddard J. (1) relies on the same section (s. 55, sub-s. 1) as giving to assessment committees the widest possible discretion as to whom they may appoint as their officers, and were the matter to remain there I should content myself with saying that I agreed that this rule should be discharged for the reasons stated in the Divisional Court which I have quoted. But, it does appear that Mr. Rowe, for Mr. Ogden, in argument took also a narrower point; that is to say, apart from the general consideration of the incompatibility of the two offices, he contended that as the clerk to the assessment committee admittedly was present to advise the committee on procedure it was highly important that he should be impartial: that is to argue not merely from his double office, but also from the fact, as appears in Mr. Brown's affidavit, that he did in fact make a practice of advising the assessment committee on matters of procedure. du Parcq J. does mention the fact (2) that Mr. Brown, as part of his duties as committee clerk to the rating authority, had to attend meetings of the rating committee for the purpose of taking minutes of their proceedings and would appear, therefore, to have dealt not only with the duplication of office of Mr. Brown, but with to some extent his actual functions. In these circumstances, I think it is right to deal with the matter in this more limited manner, and I confine my observations, therefore, to the question whether the assessment committee should be prohibited from proceeding while Mr. Brown remains in attendance during the hearing of Mr. Ogden's case.

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(1) [1936] 2 K. B. 631.

(2) Ibid. 626, 630.

The matter thus circumscribed appears to me to raise problems other than those which were considered in the Divisional Court. In the first place, it is clear that the assessment committee constituted under s. 17 of the Rating and Valuation Act, 1925, to hear objections made to the draft valuation list under s. 27, and finally to approve the list under s. 28 of the same Act, is a body performing judicial or quasi-judicial functions. If authority be needed for this proposition, it is to be found in the case of *Rex* v. *North Worcestershire Assessment Committee. Ex parte Hadley* (1), where Lord Hewart C.J., speaking of an assessment committee, said: "It is in my opinion a body of persons having legal authority to determine questions affecting the rights of subjects, and, secondly, to the extent to which it has and is performing that duty, it has, I think, the duty to act judicially." It follows, therefore, that the general principles affecting the possibility of bias, as exemplified in the case of justices of the peace, should be applied to an assessment committee, and this, I think, irrespective of their particular constitution. As has so often been stated, it is not only necessary that justice should be done, but that it should manifestly appear that justice is done, and the complaint here made is in essence that Mr. Brown is not a person who ought to advise the body which performs the judicial functions before whom his employers, the rating authority, are litigants in that, being present to advise the assessment committee on procedure, and possibly upon other legal problems—though, as he states, he takes no part in their decisions—he has already received, hearing with that attention necessitated by his duty as clerk taking the minutes to the rating committee, information (including perhaps the opinions of valuers and of counsel or solicitors)—knowledge from which he can hardly divorce himself when he advises the judicial body.

In this matter of what has been called legal bias, the authorities are all one way. In *Reg.* v. *Milledge* (2)

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(1) [1929] 2 K. B. 397, 406.

(2) (1879) 4 Q. B. D. 332.

Mr. Milledge and another, being members of a council who had carried a resolution, thereafter sat upon a bench of justices when the summons came on for hearing. Cockburn C.J. said (1) that these justices " practically made an order in a case where they were prosecutors," and the writ of certiorari was consequently made absolute. In *Reg.* v. *Brakenridge* (2) the Queen's Bench objected to the clerk to the justices acting as solicitor for one of the parties on a prosecution before his own bench. In *Rex* v. *Sussex Justices. Ex parte McCarthy* (3) the deputy clerk to the justices was a member of a firm of solicitors who were acting for the plaintiff in an action against a certain McCarthy who was being prosecuted by the police for driving a motor-car in a manner dangerous to the public. Lord Hewart C.J. speaks (4) of the long line of cases which show that " it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." —As is pointed out by Avory J. in *Rex* v. *Essex Justices. Ex parte Perkins* (5) the reported words " be seen " must be a misprint for "seem".—"The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice . . . . His two-fold position was a manifest contradiction."

Finally, in *Rex* v. *Essex Justices. Ex parte Perkins* (6) at a branch office a clerk to a solicitor conducted the solicitor's business. A lady consulted this clerk about the preparation of a separation deed, no mention being made of the matter to the solicitor except in a short reference in a weekly report

(1) 4 Q. B. D. 333.
(2) (1884) 48 J. P. 293.
(3) [1924] 1 K. B. 256.
(4) [1924] 1 K. B. 259.
(5) [1927] 2 K. B. 475, 488.
(6) Ibid. 475.

from the clerk. The solicitor acted for the justices as their clerk when they made an order in favour of the wife, but the Court held, notwithstanding the remoteness of the possibility of bias, that the rule for certiorari must go. Avory J. (1) points out that although the clerk to the justices stated on affidavit that at the time when the summons was heard he did not in fact know that his firm had acted for the applicant's wife: "If we had to consider whether or not he was in fact biassed, that statement would be most material. We have here to determine, however, whether or not there might appear to be a reasonable likelihood of his being biassed." Swift J. (2) applies the test: quoting from Lord Hewart C.J.'s judgment in *Rex* v. *Sussex Justices. Ex parte McCarthy*, where he said (3): "'Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice'" and adds: "Might a reasonable man suppose that there had here been such an interference with the course of justice? I agree that he might."

I apply these principles to the present case and ask myself whether Mr. Ogden might not reasonably suppose that justice would not be done by the assessment committee when the adviser to the committee might of necessity be acquainted with the preparation for the proceedings of his opponents, the rating committee. As I have stated, whatever advice might have been given to the rating authority by their lawyers or their advisers, such as valuers, Mr. Brown performing his attentive duties of making a précis of their proceedings for his minutes may well have known. He seems to me to be of necessity put very much in the same position as a clerk to a solicitor of a litigant who takes no part in the consultations before trial, but attentively hears all, subsequently being called upon to advise the justices in those proceedings. On the authorities which I have cited, I have little doubt what would be the result of the subsequent impeachment of the trial.

A case recently decided in the Court of Appeal, that of the *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Assessment Committee* (1) fortifies the conclusion at which I have arrived. By s. 18 of the Rating and Valuation Act, 1925, there is established in every county a committee of the county council called the county valuation committee which is entitled to take steps to promote uniformity in the principles and practice of valuation and to assist rating authorities and assessment committees in the performance of their functions. Under s. 17 there are constituted assessment committees for every assessment area. In *Rex* v. *North East Surrey Assessment Committee. Ex parte F. W. Woolworth & Co. Ld.* (2) it had been held that the presence of the county valuation officer while the assessment committee were considering their decision would invalidate the proceedings of the Assessment committee. Avory J. says (3): "I cannot doubt that, if in a particular case any difference of opinion arose in the assessment committee, they would refer to the county valuation officer, if present, for his advice and assistance. The mere fact that he did not in the present case tender any advice or assistance is clearly shown by the authorities not to be sufficient of itself to get rid of the disqualification." In the *Middlesex* case (1) it was further held that while the valuation committee had a right to send its valuation officer or other responsible person to attend the meetings of the assessment committee he could not properly participate in the decisions of the committee. Lord Wright M.R. says (4): "The decision which the assessment committee are arriving at is the decision of the committee itself. The county valuation committee have nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body. It would be most improper, on general principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision." Romer L.J. adds (5): "The presence of the valuation officer

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(1) [1927] 2 K. B. 488.

(2) Ibid. 490.

(3) [1924] 1 K. B. 256, 259.

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(1) [1937] 1 Ch. 361.
(2) [1933] 1 K. B. 776.
(3) Ibid. 786.
(4) [1937] 1 Ch. 376.
(5) Ibid. 379.

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with the committee on such an occasion would infringe one of the fundamental principles of law relating to the administration of justice in this country."

To these common law objections to the presence of Mr. Brown it was further argued for the Assessment Committee that, inasmuch as there is a statutory disqualification applying to certain named persons in Schedule 4, Part III., cl. 4 of the Act which does not mention the clerk of the rating authority applying the maxim "expressio unius est exclusio alterius," this disqualification impliedly permits the presence of the clerk of the rating authority. This matter was not considered by the Divisional Court in the *North East Surrey* case (1) nor in this Court in the *Middlesex* case (2) in dealing with the case of the county valuation officer and appears to me quite untenable. On this view, a relation of a party sitting on the assessment committee, who in the case of justices might well be deemed to be biassed, would not be disqualified from being present as not being specifically mentioned in the Fourth Schedule, though he was indirectly interested in the result. It is clear to my mind that this provision is declaratory of certain disqualifications, but does nothing to affect persons otherwise disqualified at common law.

By cl. 12 of the First Schedule it is provided that: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment as a member of the assessment committee." This is but another example of specific disqualification; that is to say, one who from being a member of the rating committee may know of particular matters is specifically prohibited from being a member of the assessment committee—though a member of a rating authority which has not delegated its powers to a committee apparently is not, and it would seem may sit upon the assessment committee.

It appears that legislation has sometimes qualified the presence of persons whose presence would otherwise invalidate the proceedings of the tribunal and sometimes has added

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(1) [1933] 1 K. B. 776.

(2) [1937] 1 Ch. 361.

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express disqualifications. As an example of the former in London, by the Local Government Act, 1929, s. 18 (*h*): "the town clerk, or in the City of London such other officer as the council may designate or appoint, shall be the clerk to the assessment committee." But this special provision qualifying a person who, in my view, might otherwise be disqualified to act is but one more example of specific invasion of the common law objection to bias which might otherwise obtain.

On the other hand, by s. 49 of the Licensing (Consolidation) Act, 1910, it is provided in terms that "a solicitor or other person being a clerk of licensing justices shall not by himself, his partner, or clerk, as solicitor or agent for any person, conduct or act in any application for or in respect of a justices' license, or any other proceedings whatsoever under this Act . . . ."

In conclusion, I would again emphasize that in allowing this appeal I am dealing solely with the facts of this particular case. I agree with the Divisional Court that the mere duplication of offices in the rating and the assessment committees is no ground in itself for granting the rule for the reasons by them stated with which I also agree. It is the particular fact that Mr. Brown, who must be taken for the reasons I have stated to have knowledge of all the transactions of the rating authority at which he takes the minutes, advises the assessment committee of the same area on procedure which makes it impossible for me to hold that this is a case where justice appears manifestly and undoubtedly to be done. The rule craved appears to me, in its present reference to the manner in which the assessment committee acted upon this particular occasion in allowing Mr. Brown to remain in attendance during their meeting, not to be quite apt to produce the required result.

The rule which will go is to prohibit the assessment committee of the City of Salford from allowing Mr. Walter Brown to remain in attendance on the assessment committee of the said city during the hearing of the appellant's objections and proposal and during the subsequent deliberations thereof.

By r. 206 of the Crown Office Rules, Order LVIII. of the Rules of the Supreme Court dealing with appeals is applied. Under this Order the Court of Appeal has power to make such amendments as necessary in the justice of the case.

The appeal is allowed with costs.

GREENE L.J. The appellant is a ratepayer in respect of certain premises in the City of Salford. There are pending before the respondents, who are the assessment committee of the city, the matter of an objection by the appellant to the valuation list and a proposal to amend it in respect of these premises. The objection and the proposal are opposed by the council of the city as the rating authority. On March 2, 1936, the appellant obtained a rule nisi for a writ of prohibition prohibiting the respondents from acting on two resolutions passed by them. The first of these resolutions dated June 26, 1935, purports to appoint one Mr. W. Brown as acting clerk to the respondents, the second dated January 15, 1936, was passed on the occasion of a meeting of the respondents convened for the purpose of hearing certain rating cases, including the objection and proposal above mentioned. Objection had been taken on behalf of the appellant to the presence of Mr. Brown in the capacity of acting clerk to the respondents at any meeting of the respondents at which the objection and proposal should be considered and the resolution of January 15, 1936, was passed in view of this objection. It was to the effect that "the acting clerk remain in attendance upon the committee during the whole meeting." It is common ground that this resolution means that Mr. Brown was to attend both the hearing of the objection and proposal and the subsequent deliberations of the respondents thereon. Owing to lack of time the matter was not dealt with at that meeting and it was and still stands adjourned.

On May 6, 1936, the rule nisi was discharged by a Divisional Court consisting of the Lord Chief Justice and du Parcq and Goddard JJ. In the argument before the Divisional Court both resolutions were attacked, the grounds of the attack, broadly stated, being, as to the earlier resolution, that the post held by Mr. Brown under the city council disqualified him from holding the position of acting clerk to the respondents, and as to the later resolution, that his post under the council disqualified him from acting as clerk to the respondents upon the hearing of and deliberation upon the appellant's objection and proposal and the city's opposition thereto. At the hearing before us the attack upon the first resolution was abandoned, since it became apparent in the course of the argument that an objection to Mr. Brown acting as clerk could only be sustained, if at all, in reference to specific matters in which he might be, or appear to be, biassed in favour of the rating authority.

Mr. Brown's position under the city council is stated in his affidavit. He is engaged in the administrative section of the town clerk's department. He is chief committee clerk to the council and he is registration and elections officer. As committee clerk he attends meetings of the rating committee of the city council for the purpose of taking minutes of their proceedings, but apart from merely recording such proceedings he is in no way concerned with their decisions and takes no part, advisory or otherwise, therein.

As acting clerk to the assessment committee, Mr. Brown acts in an administrative capacity, conducting all correspondence, making notes of their proceedings, advising them of the proper procedure, making the proper entries in the valuation lists of the amendments authorized by the decisions of the committee but taking no part in such decisions although he is present while the committee is considering them.

It was not suggested before us that the mere fact that Mr. Brown is engaged in the administrative section of the town clerk's department raises a possibility or an appearance of the possibility of a bias on his part in favour of the council as rating authority in connection with any proceedings before the assessment committee in which the rating authority is concerned as a party. The real objection was based upon the circumstance that as committee clerk it is his duty to be present at meetings of the rating committee of the council, and that at such meetings he must, of necessity, hear any discussions which may take place as to proceedings, actual or contemplated, before the assessment committee in which the rating authority is concerned; and it was said that a person who has in his mind information so obtained, if he afterwards acts as clerk to the assessment committee in connection with such proceedings, may be affected, or appear to be affected, by bias in favour of the rating authority.

In my opinion, this objection lacks substance. Whether or not a person is disqualified from acting in a certain capacity upon the ground of real or apparent bias is, in my opinion, a question to be determined upon the facts of the particular case. In the present case, the body under whom Mr. Brown proposes to act is the assessment committee. By s. 17, sub-s. 3, of the Rating and Valuation Act, 1925, as amended by s. 15, sub-s. 1, of the Local Government Act, 1929, the assessment committee for a county borough is appointed by the council of the borough, that is to say, by the rating authority for the borough, and two-thirds of its members may be members of the council. In the present case the assessment committee consists of twenty persons, of whom thirteen are members of the council. As is usual, at any rate in large boroughs, the duties of the council in connection with the preparation of valuation lists are delegated to a rating committee of the council. By r. 12 in the First Schedule to the Rating and Valuation Act, 1925, no member of the rating committee can be a member of the assessment committee.

Now by the constitution of the assessment committee—a constitution considered by the Legislature, if not desirable at any rate not objectionable—a majority of its members consist of members of the very body, namely, the rating authority, which will be vitally interested in the decisions of the committee. It is not disputed that these members as members of the city council are entitled to see the minutes of the council and its committees, including those of the rating committee itself. I am unable to see that a person who is present at the meetings of the rating committee for the purpose, and the purpose only, of taking these minutes, can be supposed to bring the reality or the appearance of bias to the discharge of his very limited duties as clerk to the assessment committee, constituted as it is constituted with a majority of members who are appointed by the rating authority itself and are able to inform themselves by inspection of the minutes as to what takes place at meetings of the rating committee. Assessment committees are bodies with a special constitution of their own and peculiar functions, and it is I think misleading to approach the present question as though it were one relating to a tribunal such as magistrates and their clerk.

An attempt was made to reinforce the argument by saying that discussions may take place and documents (such as opinions of counsel) may be produced in the rating committee which would not necessarily be recorded in the minutes. I am not prepared to assume that any matter of substance dealt with by the rating committee will fail to appear in the minutes; and as for documents produced, even if it be improper for a member of the assessment committee who is also a member of the city council to inspect any of the council's documents which he pleases in the absence of any internal regulation of the council prohibiting him from doing so (a matter as to which I express no opinion) it is to be observed that the delegation of duties in connection with rating to a rating committee is only permissive; and this to my mind shows that the Legislature did not intend to treat the possession of knowledge obtained by a member of the assessment committee in his capacity as a member of the rating authority as in any way incapacitating him from sitting at the hearing and determination of appeals to which the rating authority is itself a party.

I repeat that upon the facts of this case the objection in my opinion lacks substance, and I would dismiss the appeal.

Luxmoore J. On May 6, 1936, the Divisional Court discharged a rule nisi for a writ of prohibition to prohibit the assessment committee for the City of Salford from acting on two resolutions passed by that committee. The rule nisi was obtained by the appellant, who is a ratepayer, in respect of certain premises in the City of Salford comprising several cinemas and a billiard hall. He appeals from the decision of the Divisional Court.

The material facts are as follows: On October 14, 1933, a draft valuation list of the rating area of Salford in the Salford assessment area was made by the rating committee of the council of the City of Salford to whom the council had delegated its duties in respect of the preparation of the valuation list. The draft valuation list was signed by the town clerk of Salford as the clerk to the rating authority.

On November 1, 1933, the appellant objected to the valuations proposed in respect of each of the properties in which he is interested, and on February 12, 1935, he proposed that the valuation list then in force for the rating area should be amended by reducing the assessment in respect of the billiard hall. On February 14, 1935, the council as the rating authority gave notice to the appellant's solicitors of objection to the proposal for this amendment. After some correspondence between the town clerk and the appellant's solicitors notice was given on December 30, 1935, to the appellant's solicitors that the assessment committee would meet on January 15, 1936, for the purpose of considering proposals or objections to the valuation lists. This notice was signed on behalf of the assessment committee by one Walter Brown, who is described in the notice as acting clerk to the assessment committee. Mr. Brown was appointed as acting clerk to the assessment committee by a resolution of June 26, 1935. This is the first of the two resolutions to which the appellant objects. The minutes of the assessment committee disclose the fact that the question of appointing the town clerk of Salford as clerk to the assessment committee was under consideration and that the resolution appointing Mr. Brown as acting clerk to that committee was a temporary appointment pending the consideration of the question of the town clerk's appointment.

On January 2, 1936, the appellant's solicitors wrote to Mr. Brown a letter in which they stated that if at the meeting of the assessment committee on January 15, 1936, he presided

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[*sic*] in the capacity of clerk or acting clerk to the committee objection would be taken "to the committee hearing and determining the proposals and objections on the grounds (inter alia) that it was not lawful for him to preside [*sic*] because he was an officer in the employ of the Salford rating authority which was one of the parties to the proceedings." This notice was read at a meeting of the assessment committee on January 15, 1936, when it was resolved that Mr. Brown should remain in attendance upon the assessment committee during the whole of the meeting. This is the second resolution to which the appellant objects. The appellant's objections and proposal relating to the properties in which he is interested were not reached on January 15, 1936, and the consideration was deferred and is still pending.

On March 2, 1936, the appellant obtained a rule nisi against the assessment committee to show cause why a writ of prohibition should not be awarded to prohibit the assessment committee from acting on the resolution of June 26, 1935, and in the manner shown by their resolution of January 15, 1936.

It appears from the judgments in the Divisional Court that the objection to the resolutions was put on three grounds. The first ground was that the resolutions were ultra vires because they offended against certain statutory provisions specified in the order of March 2, 1936, and the second that if Mr. Brown acted as clerk to the assessment committee a suspicion of bias would be likely to arise by reason of the fact that he was an officer employed in the town clerk's department. The third ground was that suspicion of bias would arise because Mr. Brown acted as committee clerk to the rating committee and in that capacity was present at their meetings, his duty being to make minutes of what transpired. The first two grounds were dealt with by the Divisional Court, and though the fact that Mr. Brown acted as committee clerk and attended the meetings of the rating committee is mentioned by du Parcq J. in his judgment the Court did not in fact deal with this aspect of the case.

It will be observed that the first and second grounds challenge the validity of both resolutions on the broad ground that Mr. Brown is disqualified entirely from acting as clerk to the assessment committee, while the third ground challenges the validity of the resolution of January 15, 1936, directing him to be present during the whole of the meeting of the assessment committee, which it is admitted means during the hearing of the appellant's objections and proposals and the subsequent deliberations of the assessment committee thereon.

During the hearing before us the attack on the resolutions on the first two grounds was abandoned and the appeal was thereafter confined to the attack on the resolution of January 15, 1936, on the third ground.

It seems to me that the case was not considered from this point of view in the Divisional Court. In considering it, it is necessary to bear in mind that it is the duty of the assessment committee constituted under s. 17 of the Rating and Valuation Act, 1925, to hear under s. 27 of that Act objections to the draft valuation list made by the rating authority, and under s. 28 finally to approve the list. On the hearing among others entitled to appear and be heard are the objector and the rating authority. There can be no doubt that the assessment committee in discharging the duties referred to is performing judicial or quasi-judicial functions: see *Rex* v. *North Worcestershire Assessment Committee. Ex parte Hadley* (1), per Lord Hewart C.J. It seems to me that the general principles relating to the conduct of judicial proceedings apply equally to the proceedings and deliberations of an assessment committee when performing judicial or quasi-judicial functions as to the proceedings of any other body acting in a judicial or quasi-judicial capacity; unless there is some statutory relaxation of those principles in the case of an assessment committee. Included in those general principles are those relating to bias or the possibility of bias having regard to the actual constitution of the body whose duty it is to adjudicate. These principles are well settled. In cases where the bias alleged is other than pecuniary the real likelihood of bias must be shown by the party objecting. It must necessarily be a question of degree whether the position of the person attacked is such as to give rise to a reasonable suspicion of bias in the mind of a reasonable person. Many cases in which persons have been held to be disqualified on this ground are to be found in the books—for example an order of a bench of magistrates in proceedings by a lady against her husband was quashed because a clerk to the solicitor who acted as clerk to the magistrates when the order was made had acted for the lady in the preparation of a separation deed—*Rex* v. *Essex Justices. Ex parte Perkins.* (1) In his judgment in that case Avory J. (2) referred to what was said by Lord Hewart C.J. in *Rex* v. *Sussex Justices. Ex parte McCarthy.* (3) The passage he referred to material to this case is this: "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Avory J. said: "I think that in that sentence the words 'be seen' must be a misprint for the word 'seem.'" He then continued the quotation from Lord Hewart C.J. as follows: "The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

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(1) [1929] 2 K. B. 397, 406.

In the present case it appears that Mr. Brown has been in the employment of the council of the City of Salford for some thirty-four years and that he has during that time been engaged in the town clerk's department. It is part of his duty to attend as committee clerk meetings of the rating committee for the purpose of taking minutes of the proceedings of that committee. It is to this committee that the council has delegated its duties with respect to the preparation of the valuation lists which the appellant is seeking to have amended or altered by the assessment committee. It is Mr. Brown's duty as acting clerk to the assessment committee among other things to be present at the hearing of the applications before the assessment committee with regard to the valuation list, and to advise them of the proper procedure thereat, and to make notes of the proceedings. In addition he has certain administrative acts to perform which are not material to be stated. Mr. Brown has stated in his affidavit that he takes no part in the decisions of the assessment committee, but it is not suggested that he takes no part in the discussions preliminary thereto.

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(1) [1927] 2 K. B. 475.
(2) Ibid. 488.
(3) [1924] 1 K. B. 256, 259.

The appellant's application to the assessment committee is being opposed on behalf of the rating committee, and it certainly does not appear to me unreasonable to suppose that the appellant might properly think that justice might not be done if a person, having the knowledge that Mr. Brown must necessarily have with regard to the rating committee's discussions upon his objections and proposal in respect of the valuation lists, should be present at the hearing by the assessment committee of those objections and that proposal for the purpose of advising the assessment committee on any question of procedure arising during that hearing, or at the subsequent deliberations of the assessment committee thereon.

It is said that Mr. Brown's duties at the meetings of the rating committee are merely ministerial and that the objection on this ground cannot be substantial because a majority of the members of the assessment committee are members of the council and are able to call for and inspect all the minutes of the council including those of the rating committee and also any opinions of counsel obtained on behalf of the rating committee. So far as the minutes are concerned they are of necessity only a précis of what has happened at the meetings and do not disclose the reasons why the resolutions are arrived at. With regard to the opinions of counsel taken on behalf of the rating committee it would, I think, be improper for a member of the assessment committee who is also a member of the council to exercise his rights as a member of the council to obtain information from the inspection of opinions which would not be admissible at the hearing before the assessment committee and would not be available to all its members. It seems to me that the adoption of such a course by one or more of the members of the assessment committee might well vitiate the proceedings before it.

It is further said that the constitution of the assessment committee, which by statute is authorized to include, and in the present case does include, members of the city council so long as their number does not exceed two-thirds of the total number of members of the assessment committee renders unreasonable the appellant's objection to Mr. Brown's presence at the hearing of his objections and proposal by the assessment committee and their deliberations thereon. I am unable to accept that argument. In this connection it is material to bear in mind that there is a statutory prohibition against any member of the rating committee being a member of the assessment committee. But apart from this, I am of opinion that a statutory relaxation of the general principles with regard to the conduct of judicial or quasi-judicial proceedings in respect of some particular person or class of persons owing to the necessary implication to be inferred from the provisions of some particular statutory enactment can only apply to the person or class of persons mentioned in the enactment and cannot be extended so as to include a person or class of persons in a different position. Slesser L.J., whose judgment I have had the opportunity of reading and with which I respectfully agree, has referred to a number of cases in which there has been statutory invasion of the common law objection on the ground of bias which might otherwise obtain and I therefore refrain from further reference to those cases.

I respectfully agree that the fact that Mr. Brown has two-fold duties to perform with regard to the rating committee and the assessment committee does not in itself afford a sufficient ground for prohibiting him from acting as clerk

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to the assessment committee for the reasons stated by the Divisional Court, but I think for the reasons I have endeavoured to state that on the particular facts of this case the assessment committee should be prohibited from allowing Mr. Brown to remain in attendance on the assessment committee during the hearing of the appellant's objections and proposal and also during the subsequent deliberations thereon, and that to this limited extent the appeal should be allowed.

Slesser L.J. The appeal will be allowed. The rule which will go is to prohibit the assessment committee of the City of Salford from allowing Mr. Walter Brown to remain in attendance at the assessment committee of such city during the hearing of the appellant's objections and proposal, and during the subsequent deliberations thereon.

Appeal allowed.
Leave granted to appeal to the House of Lords.

Solicitors for appellant: *Peacock & Goddard, for Percy H. Barker & Co., Manchester.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for Brett & Co., Manchester.*

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GREAT WESTERN RAILWAY COMPANY *v.* CHAMBER OF SHIPPING OF THE UNITED KINGDOM.

Railway—Exceptional rates—Exceptional rates more than 40 *per cent. under standard rates—Application to Railway Rates Tribunal for consent—Objection—Limit of matters to be considered by the Tribunal —Railways Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *s.* 37, *sub-ss.* 1, 2; *ss.* 38, 39—*Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 39.

When a railway company seeks the consent of the Railway Rates Tribunal under s. 37, sub-s. 1, of the Railways Act, 1921, to the grant of exceptional rates for certain traffic which are more than 40 per cent. below the standard rates chargeable, the Tribunal is only concerned to consider (1.) whether the effect of the exceptional rates proposed will be to affect prejudicially the revenue of the company, and (2.) whether persons using or desiring to use the railway will be prejudiced.

The Tribunal is not therefore concerned to inquire whether the exceptional rate will prejudice coastal carriers by placing them at a disadvantage and will therefore be undesirable in the national interest.

APPEAL from the Railway Rates Tribunal.

On April 28, 1936, the Great Western Railway applied under s. 37, sub-s. 1, of the Railways Act, 1921, for the consent of the Tribunal to the granting of exceptional rates, which are more than 40 per cent. below standard, for the carriage of grain (list E) between the Bristol Port Group and Truro, Penryn and Penzance. On May 12, 1936, the Chamber of Shipping of the United Kingdom gave notice of objection, having first obtained a certificate from the Board of Trade dated May 11, 1936, that it represented persons likely to be affected by the decision to be given on this application. The grounds of objection were stated as follows:—

"The grain (list E) traffic between the Bristol Port Group and Truro, Penryn and Penzance . . . . has hitherto been carried by coastal carriers. The granting of the proposed exceptional rates would divert the traffic to rail and adversely affect members of the Chamber of Shipping whose vessels are employed in the Coasting Trade."

"The proposed rates are 57, 58 and 56 per cent. respectively below standard and if granted would place coastal carriers at an undue and unfair disadvantage. Further, it is submitted that the proposed exceptional rates, if granted, would by reason of their prejudicial effect upon the interests of coastwise shipping be undesirable in the national interest."

The Chamber therefore claimed to be heard on the application. At the hearing before the Railway Rates Tribunal the objectors asked for leave to amend their grounds of objection by adding an allegation that the proposed rates were so low as to jeopardize the standard revenue of the railway company.

The Tribunal in giving judgment said that they held themselves bound by the decision of the Court in *Great Western Ry. Co. and London Midland & Scottish Ry. Co. and Others* v. *Bristol Corporation* (1) to decide that a body which had the certificate of the Board of Trade under s. 78, sub-s. 3, of the Railways Act, 1921, was entitled to be heard in opposition to an application to the Tribunal for their consent to the granting of an exceptional rate under s. 37 of the Act.

They further interpretated that decision as a finding that the only question which was relevant to consideration of such an application was the question of the effect which the exceptional rate, if granted, would have upon the revenue of the railway company concerned; and that it was not a relevant ground of objection that the granting of such a rate would have a prejudicial effect upon some competing carrier. The grounds of the objection in this case were therefore grounds that the Tribunal were not entitled to consider.

The Chamber of Shipping had sought leave to amend their objection by adding that the proposed rates were so low as to jeopardize the realization of the standard revenue of the railway company. They must refuse leave to amend.

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(1) (1928) 20 Ry. & Can. Tr. Cas. 22.

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The only ground upon which the Chamber of Shipping really desired to object to the proposed rates was that the granting of them would place coastal carriers at an undue and unfair disadvantage and that to do this was not in the national interest. They were not concerned with whether the standard revenue of the railway company would be jeopardized.

The Tribunal then proceeded to hear evidence in support of the application and in the result consented to the granting of the rates shown in the Great Western Ry. Co.'s Schedule numbered 2167, except that in place of Bristol Port Group they inserted Avonmouth Docks Junction and Portishead Docks Junction.

The Chamber of Shipping appealed.

The only question raised on the appeal was whether the Tribunal were right in refusing to hear the objections of the Chamber of Shipping and in limiting their inquiry to whether the granting of the exceptional rates would jeopardize the standard revenue of the railway company.

The appeal was heard on March 2 and 3, 1937.

Sir Robert Aske K.C. and *Roland Adams* for the appellants. The appeal arises under s. 37, sub-s. 1, of the Railways Act, 1921, a sub-section which provides that exceptional rates which are more than 40 per cent. below the standard cannot be granted without the consent of the Rates Tribunal. The appellants objected to the granting of the exceptional rates on two grounds (1.) that coastal carriers would be adversely affected by the new rates which would divert the carriage of grain to Cornwall from them to the railway and place them at an undue and unfair disadvantage, and (2.) that the coastal carriers would be driven out of the traffic and that this would be undesirable in the national interest. The Tribunal is wrong in holding that neither of these grounds of objection were relevant to the matter in hand. Sect. 37, sub-s. 2, which relates to exceptional rates granted by the railway company without the consent of the Rates Tribunal, because the decrease in rate is less than 40 per cent. gives the Minister power to intervene and refer the matter to the Rates Tribunal. Sect. 37

is the only section which deals with new exceptional rates. Sect. 38 deals with the variation of exceptional rates. Under s. 38, sub-s. 3, a company may at any time increase an exceptional rate which has not been fixed by the Tribunal, but objection may be taken by any trader interested. In Sch. V., para. 20, " trader " is defined for the purpose of the Schedule as including " any person sending or receiving or desiring to send or receive merchandise by railway." It is to be noted that s. 39 gives bodies representative of the interests of shipping power to make representation to the Minister that exceptional rates are being charged which are competitive with coastwise shipping in such a manner as to be detrimental to the public interest and the Minister will (if satisfied that a prima facie case has been made out) refer the matter to the Rates Tribunal which will hear all parties whose interests are affected. That section was re-enacted in a slightly modified form in the Road and Rail Traffic Act, 1933, s. 39.

The existence of this provision supports the view that the appellants were entitled to be heard on their objection under s. 37. If detrimental competition is a ground for cancelling an exceptional rate, it must surely be possible to raise the same issue before an exceptional rate is imposed. To wait till after it had been imposed might involve waiting till the injury had been done to the coastwise traffic. Traffic once lost is not easily regained: s. 78 defines the representative bodies having a right to intervene; see also ss. 43 and 45.

The view taken by the Tribunal in *Great Western Ry. Co. and London, Midland & Scottish Ry. Co.* v. *Bristol Corporation* (1) in so far as it is adverse to the appellants' contention ought not to be accepted. Sect. 37 confers a very wide discretion on the Tribunal and the objections of the appellants ought to have been heard.

Alfred Tylor and *F. H. Newark* for the Great Western Ry. Co. The Tribunal is not concerned under s. 37, sub-s. 1, of the Act of 1921, with anything except the financial effect on the railway company of the exceptional rate proposed. It is not disputed that such a body as the

(1) 20 Ry. & Can. Tr. Cas. 22.

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appellants has a right to object under s. 78, sub-s. 3, but not on the grounds relied on here. The appellants have a right after an exceptional rate has been introduced to go to the Minister under s. 39 (now s. 39 of the Act of 1933) and make representations that exceptional rates are being charged which place coastal carriers at an undue or unfair disadvantage and the Minister (if satisfied that a prima facie case has been made out) will refer the matter to the Rates Tribunal for review. The very existence of this right and the limitations imposed in respect of it (including a provision in s. 39, sub-s. 6, for an addition to the membership of the Tribunal dealing with such a case) show that no such grounds of objection are open before the Tribunal deciding whether an exceptional rate shall be granted under s. 37, sub-s. 1. Under s. 39 bodies representative of the interests of persons engaged in the coastwise shipping or canal trade can alone apply; and it is contended that under s. 37, sub-s. 1, the only persons who can object to the proposed exceptional rates are traders. But however that may be the sole ground of objection is that the proposed rates will injure the railway company financially and so defeat the object for which the standard rates were established under the Act. Sect. 37, sub-s. 2, and s. 38 deal with proceedings which may be taken after an exceptional rate has come into existence. Thus, under s. 37, sub-s. 2, when an exceptional rate has been granted by the railway company the Minister may refer the matter to the Rates Tribunal where any class of user of the railway appears to be prejudicially affected. Then s. 38 deals with the variation of exceptional rates, in sub-s. 1 by increasing or cancelling such a rate when fixed by the Rates Tribunal, and in the later subsection, in cases where the railway company seeks to increase or cancel exceptional rates fixed by the company without obtaining the consent of the Tribunal, and traders interested object. The careful delimitation of inquiries under ss. 38 and 39 are only reconcilable with the view that under s. 37, sub-s. 1, there cannot be a right to a roving inquiry but only to one limited to financial considerations.

Sir Robert Aske K.C. in reply. It would be unreasonable that the Tribunal should not have under s. 37, sub-s. 1, power to consider the result of fixing rates so low as to deprive others of traffic. There is nothing in the Act to limit the Tribunal to a consideration of the effect of granting the exceptional rates on the revenue of the company. The Rates Tribunal was set up as an inexpensive tribunal to decide all questions connected with railway rates. If the vital consideration was the effect on the company's revenue the company would not have been given power to lower rates up to 40 per cent. without obtaining the Tribunal's consent.

Lord Wright M.R. This is an appeal by the Chamber of Shipping of the United Kingdom against a decision of the Railway Rates Tribunal. The appeal is, first against the refusal of the Tribunal to amend the notice of objection (that point has not been pursued before this Court and I need say no more about it), and, secondly, it aims at obtaining an order that the Court of the Railway Rates Tribunal shall be directed to hear the submission of the appellants as the objectors, on their notice of objection in regard to the exceptional rates submitted by the railway company for the grain traffic between the Bristol Port Group and Truro, Penryn and Penzance. The railway company were submitting to the Railway Rates Tribunal for approval three proposed exceptional rates, which were respectively 57, 58 and 56 per cent. below the standard charges. The notice of objection is based upon the statement that the granting of the proposed exceptional rate would divert the traffic hitherto carried by coastal traders represented by and members of the Chamber of Shipping, to the railway. Para. 5 of the notice of objection says that the proposed rates are 57, 58 and 56 per cent. respectively below standard, and, if granted, would place coastal carriers at an undue and unfair "disadvantage." There is a further submission "that the proposed exceptional rates, if granted, would by reason of their prejudicial effect upon the interests of coastwise shipping be undesirable in the national interest." Thus these objections raise the issue that the new proposed rates would interfere with the fair competition of the vessels employed in the coasting trade, would drive them out of the traffic which at present they carry and would be undesirable in the national interest.

Now, the only question relevant on this notice of appeal, and argued here, is the question involved in these two objections. When the matter came before the Railway Rates Tribunal they had a further point before them—namely, whether the Chamber of Shipping had a right of audience in opposition to the application at all. The Chamber of Shipping had obtained a certificate from the Board of Trade under the appropriate section. The Tribunal held that the Chamber of Shipping was entitled to appear in opposition, and that part of the decision is not in question here; it is accepted throughout that the Chamber of Shipping has a right to appear. The only question, therefore, is, what is the scope of the inquiry in which they are entitled to appear? On that the Tribunal, basing itself on an earlier decision of the Tribunal, has come to this conclusion: "We further interpret that decision"—that is the decision in the *Great Western Ry. Co. and London, Midland & Scottish Ry. Co.* v. *Bristol Corporation* (1) "as a finding that the only question which is relevant to the consideration of such an application for consent to grant an exceptional rate is the question of the effect which the rate if granted would have upon the revenue of the railway company concerned; that it is not a relevant ground of objection that the granting of such a rate would have a prejudicial effect upon some competing carrier." That is the point raised by this appeal, and the only point which I intend to discuss here. Any other points which might have been raised, but were not, may be raised perhaps at some other time, and so far as my decision is concerned they are reserved.

The question turns on the true construction of s. 37, sub-s. 1, of the Railways Act, 1921. That sub-section does not in terms directly dispose of the problem raised here, but it must be construed in its place and according to its context as a section appearing in the Railways Act, 1921. It provides that "On and after the appointed day an amalgamated company or a railway company to which a schedule of standard charges has been applied shall be at liberty to grant new exceptional rates in respect of the carriage of any merchandise, which rates shall within fourteen days, or such longer period as the Minister may allow, be reported to the Minister; so, however, that a new exceptional rate so granted shall not, without the consent of the rates tribunal, be . . . . more than forty per cent. below the standard rate chargeable." I omit certain words which were repealed by the Road and Rail Traffic Act, 1933.

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(1) 20 Ry. & Can. Tr. Cas. 22.

In order to understand that it is necessary to turn very shortly to the general scope of the Act in respect of fixing charges by railway companies for the carriage of goods. The scheme of the Act is that at the outset there should be prepared by the companies and settled by the Tribunal a schedule of standard charges, which charges are to be applied by the company except in so far as what are called exceptional rates are granted and fixed. The adjustment of charges is defined by another section of the Act, that is s. 58. They are to be fixed, in the first instance, with reference to certain considerations which are set out in s. 58 at some length. The first matter to be considered is that the charges shall "so far as practicable yield, with efficient and economical working and management, an annual net revenue," referred to as the "standard revenue," which is to be arrived at by consideration of their earnings before the Act came into force. That, however, is not the only matter which is to be taken into account in fixing the standard charges. These are to be fixed partly with a view of encouraging economies in working and management expenses, and the Tribunal are also to have regard to what will be most likely to ensure the maximum development and extension in the public interest of the carriage by railway of merchandize and of passengers and their luggage; and they have also to take into account the charges in respect of any business carried on by the company auxiliary or subsidiary to its railways. These are the main subject-matters to which the Tribunal are directed to have regard in fixing the standard rates.

When it comes to the exceptional rates, as they are called —and we are concerned here with new exceptional rates, for there is a provision which need not be discussed here for continuing exceptional rates—we find in s. 37 a general liberty, in the words which I have read, in the company to grant or give to the public new exceptional rates, and so far, and speaking generally, these rates must be reported to the Minister within the period of fourteen days, or longer, if necessary. There is, however, a special provision governing the bringing into effect of new exceptional rates if those exceptional rates are more than 40 per cent. below the standard rate chargeable. Then they are not to be operative without the consent of the Rates Tribunal. The question here has reference to the granting of the consent of the Rates Tribunal in respect of exceptional rates, all of which are more than 40 per cent. below the standard rate chargeable. The Tribunal have held that though the applicants have a right of audience at the proceedings, yet the scope of inquiry competent to the Tribunal under s. 37, sub-s. 1, is limited to questions which I may compendiously describe as such questions as arise under s. 58, that is to say, in the main but not exclusively, questions relevant to the effect of the new exceptional rate on the standard revenue. The Tribunal have rejected the contention of the applicants that the relevant inquiry must include questions going far beyond this—namely, questions relating to the effect of these new exceptional rates on the trade position of the members of the Chamber of Shipping whose vessels are employed in the coastal trade. There is certainly no express provision in s. 37, sub-s. 1, giving the Chamber of Shipping any right to raise these questions. I agree with the Tribunal that on the fair construction of s. 37, sub-s. 1, looking at its purpose and its position in the whole Act, and in particular certain matters which I shall refer to next, the true construction is that these matters are not open on the hearing before the Tribunal under that sub-section. They go, I think, beyond the scope of the inquiry under that sub-section. The inquiry is only necessary in order to obtain the consent of the Tribunal, and the consent of the Tribunal which is sought is to the charging of an exceptional rate much less than the standard rate; primarily that is purely a question of the company's own finance, and to that question I think the matters which the Chamber of Shipping seek to raise are not relevant.

There are some other sections to which I shall have to refer, but I think it important at once to emphasize this point in considering s. 39 of the Act of 1921, and still more s. 39 of the Road and Rail Traffic Act, 1933, which is the same section as s. 39 of the Act of 1921 so far as it relates to shipping. Sect. 39 of the Act of 1921 is in these terms: "If and whenever representations are made to the Minister by any body of persons who, in the opinion of the Board of Trade, are properly representative of the interests of shipping or canals, that exceptional rates are being charged which are competitive with coastwise shipping or canals in such a manner as to be detrimental to the public interest, and which are inadequate having regard to the cost of affording the service or services in respect of which the rates are charged, the Minister shall (if satisfied that a prima facie case has been made out) refer the matter to the rates tribunal for review, and the rates tribunal may, after hearing all parties whose interests are affected, vary or cancel such rates or make such other order as may seem to them expedient." That section deals with exceptional rates which have actually been granted and which are in force; and Sir Robert Aske, with some cogency, has argued that an inquiry at that stage may be nugatory for all practical purposes, because it might be closing the door after the horse has gone; in other words, the shipping concerns may have lost their trade which has been diverted, and is difficult to get back, by reason of the special attraction afforded by the newly applied exceptional rate. That may or may not be true, but it is not a matter which can determine the decision of this Court. What I observe at once in s. 39 is that the Act has thought fit to impose special conditions, preliminary requirements, before a body like the Chamber of Shipping is entitled to require the Tribunal to embark upon this complicated inquiry; and it is impossible to believe that that would have been done if, under s. 37, sub-s. 1, contrary to my opinion on the section itself, it had been open to the Chamber of Shipping to bring into question and to have investigated all these matters on the proceedings under that sub-section.

The matter, however, becomes even clearer when reference is made to s. 39 of the Act of 1933, which has repealed and replaced s. 39 of the Act of 1921 so far as it relates to shipping. There you have in s. 39, sub-s. 2, the same preliminary conditions. There must be a representation to the Minister by a body which is in the opinion of the Board of Trade properly representative of the interests of the persons engaged in the coastwise shipping business, coastal carriers, that agreed charges or exceptional rates which are being made or charged by a railway company in competition with coastal carriers places them at an undue or unfair disadvantage or—this is an alternative to part of the language of s. 39 of the Act of 1921—"are inadequate, having regard to the cost of affording the service or services in respect of which they are made or charged." So you have a representation made to the Minister by a proper body and then the Minister is to consult with the Board of Trade on the matter and if it appears to him prima facie that the complaint is one which in the national interest should be investigated he shall refer the matter to the Tribunal for investigation and review. That is the procedure, carefully guarded and under the control of the Minister and of the Board of Trade, in whose judgment it rests whether the question shall come before the Tribunal at all. There follow certain sections which I do not need to read, which show very clearly the very comprehensive nature of the inquiry, the extent to which evidence is to be heard and various other matters carefully stated, which the Tribunal are to consider in dealing with these questions of competition.

There is still one other point to which I must refer; sub-s. 6 of s. 39 of the 1933 Act provides for an addition to the Tribunal when it is hearing a matter of this sort. There has to be constituted a panel called the " 'shipping panel' consisting of six persons nominated by the President of the Board of Trade, after consultation with such persons as he may consider to be properly representative of the interests of coastal carriers, and " for the purposes of the powers and duties of the Tribunal under this section there shall be added to the Tribunal one additional member selected by the Minister from the shipping panel," and there are various other consequential provisions. To my mind, as I have already said, if all those questions were open to discussion under s. 37, sub-s. 1, without any conditions or any preliminary sanction of the Minister or of the Board of Trade, it is incredible to me that this elaborate code of procedure should be inserted in the Act. That to my mind is conclusive in support of the opinion at which I had arrived on the language of s. 37, sub-s. 1, by itself and read with its context.

Reference has been made at some length to certain other provisions of the Act, s. 37, sub-s. 2, and s. 38. They all deal with proceedings which may be taken after an exceptional rate has been put into effect, and these sections are not limited to cases where the exceptional rate is more than 40 per cent. below the standard rate chargeable. These again permit an enlarged inquiry under the circumstances to which they apply, but the cases in which that enlarged inquiry into the rates is permissible are carefully limited in all these sections. Under sub-s. 2 of s. 37, where a new exceptional rate is granted " in such manner as prejudicially to affect any class of users of the railway not benefited by such rates, or so as to jeopardise the realisation of the standard revenue of such company," then the Minister may refer the matter to the Rates Tribunal, and they are to give all parties interested an opportunity of being heard and either refuse the new standard charges or cancel or modify exceptional rates. Then there is a provision for a trader at any time applying to the Rates Tribunal to fix a new exceptional rate. Sect. 38 is a complicated section which again deals with exceptional rates. Sub-sect. 1 deals with increasing or cancelling an exceptional rate which has

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been fixed by the Rates Tribunal and provides that the company shall not be entitled to increase or cancel an exceptional rate which has been already fixed by the Railway Rates Tribunal without obtaining the sanction of that Tribunal. The company, however, may reduce an exceptional rate so long as it is not reduced "so as to be more than 40 per cent. below the standard rate which would be chargeable, but any such reduction shall be reported to the Minister in like manner as if it were the grant of a new exceptional rate." Then sub-ss. 3, 4 and 5, deal with cases where a company seeks to increase an exceptional rate which has not been fixed by the Railway Rates Tribunal, and certain notice is exacted and the traders interested are to have the right of objecting, and if an objection is raised the increase shall not have effect unless and until the Railway Rates Tribunal have given the company an opportunity of being heard, and so determine. Then there is a limit on the right of the trader to object ; he is not entitled to object unless the effect of the increase is to make the rate applicable to his traffic higher than the rate applicable thereto immediately before the reduction. Then there is another similar provision with reference to cancelling an exceptional rate. There again there must be thirty days' notice, and traders interested are to have the power to intervene and to be heard under certain conditions.

I say of these provisions, as I have said of s. 39, that I find it impossible to think that the Legislature should have imposed these very stringent qualifications in all these cases if there were such a full right of discussion and investigation in a case under s. 37, sub-s. 1, as the appellants have contended for here.

I think the decision of the Tribunal was right, and should be affirmed, and the appeal dismissed with costs.

Romer L.J. The only question to be determined upon this appeal is whether the Rates Tribunal, when hearing an application by a Railway Company for leave to grant an exceptional rate under s. 37, sub-s. 1, of the Railways Act, 1921, are bound to consider the question whether the exceptional rate will prejudice coastal carriers in the sense of placing then under a disadvantage, and will, therefore, be undesirable in the national interest. In my opinion, the Rates Tribunal are not bound to consider that matter when granting an exceptional rate. It must be remembered that the Rates Tribunal are the body which has fixed the standard charges and that the exceptional rate is a variation, or may be a variation when granted, of the standard charge; and one would prima facie at any rate expect that when considering whether an exceptional rate should or should not be granted the Tribunal would merely consider the question whether the exceptional rate would jeopardize the purposes which the Tribunal had in mind when fixing the standard charge. Now the purposes which the Tribunal have to bear in mind when fixing the standard charge are set out in s. 58 of the Act, and there are two purposes, and two purposes only, therein specified. The first purpose is that of securing to the railway company a net annual revenue such as is mentioned in the section. Of course, if the only object in view was to secure a certain revenue to the railway company that object might be attained by having very high standard charges which would be paid by a comparatively small number of traders and passengers to the prejudice of a great number of people who might otherwise have been able to make use of the railway. And so s. 58 says there is another purpose to be attained by fixing the standard charges, and that is to see that in the public interest the traffic on the railway is as much as possible. That is really the effect of sub-s. 2 of s. 58. It is so important that I will read it: "The tribunal when fixing charges in pursuance of the provisions of this section shall have regard to the means which in their opinion are best calculated to ensure the maximum development and extension in the public interest of the carriage by railway of merchandise and of passengers and their luggage, and shall accordingly ascertain as far as may be practicable the effect which the existing charges, or any of them, have had upon the merchandise or passenger traffic to which they are applicable, and in particular whether the application of such charges has tended or, if continued, would be likely to tend towards causing the increase or diminution of the said traffic." The two purposes are, first, to obtain realisation of what in the Act is called the standard revenue and, secondly, to ensure that persons using or desiring to use the railway shall not be prejudiced. As I have said, prima facie, I should have thought when an application is made to the Railway Tribunal to grant an exceptional rate those are the two things they would have to take into consideration, whether either of the two purposes for which they fixed the standard charges will be prejudiced by the exceptional rate. That those are the only matters to be taken into consideration by the Tribunal is, I think, made plain by sub-s. 2 of s. 37. Under sub-s. 1 of s. 37, the railway company itself may grant exceptional rates within certain limits. It must not reduce the standard rate by more than 40 per cent. without the consent of the Rates Tribunal, but up to a 40 per cent. reduction it can do it by itself. It is quite plain that a reduction by the company might jeopardize either one or both of the purposes for which the Rates Tribunal had fixed the standard charge, and so sub-s. 2 of s. 37 provides this: " If the Minister is of opinion that any company is granting new exceptional rates in such manner as prejudicially to affect any class of users of the railway not benefited by such rates,"—that is one purpose—" or "—and here is the second purpose—" so as to jeopardise the realisation of the standard revenue of such company, he may refer the matter to the Rates Tribunal, who may, after giving all parties interested an opportunity of being heard " take such steps as are therein mentioned. It is to be observed that if the exceptional rate granted by the company prejudices coastal carriers the Minister has no power to intervene under this section and to refer the matter to the Rates Tribunal. It would be absurd to suppose that, if the railway company grants an exceptional rate 40 per cent. below the standard charge and prejudices the coastal carriers, nothing can be done under this section to refer the matter to the Rates Tribunal; but that if the company are proposing an exceptional rate of 41 per cent. below the standard charge the Rates Tribunal is to conduct the lengthy inquiry which Mr. Tylor has shown would be necessitated by having to investigate this question of prejudice to coastal carriers. In my opinion, sub-s. 2 of s. 37 is a strong indication that what I should have thought was the prima facie effect of sub-s. 1 of s. 37 is the true effect of that sub-section. The matter is placed, I think, beyond all question when one comes to consider s. 39 of the Act. Under that section, as the Master of the Rolls has pointed out, there are special steps prescribed which are to be taken if it is suspected that an exceptional rate which has come into operation is prejudicial to the coastal carriers. The matter is made even more clear, I think, when one sees that the Legislature in 1933 considered that when such a question was raised it should not be referred to the Rates Tribunal as ordinarily constituted, but that there should be added to the Rates Tribunal for that special purpose an additional member, so that there would be four members, and, consequently, the chairman of the Tribunal should have a casting vote.

For these reasons, I think this appeal fails, and must be dismissed.

Scott L.J. I entirely agree with both judgments which have been delivered, and particularly with the point of view expressed by Romer L.J. as to the probability in the circumstances of the design of the Act of 1921, that no such roving commission as is indicated in s. 39 of that Act as it originally stood, and a fortiori in s. 39 of the Act of 1933 as it now is, was contemplated on the inquiry of the Rates Tribunal under s. 37. The essence of the plan of the Railways Act was to have a complete new classification of charges, charges including both rates on merchandise and fares for passengers and, prima facie, that all exceptional rates should be got rid of. That appears in the sections following after s. 30 down to s. 36. Sect. 36 says, " On and from the appointed day," that is when the new schedule of charges to be settled by the Rates Tribunal is to come into effect, " all exceptional rates in operation immediately before the appointed day on the railway," etc., " shall cease to operate," with certain quite minor exceptions. Then you get s. 37 providing that on those new schedules of standard charges new exceptional rates may be granted. But as Romer L.J. has pointed out so very clearly, those schedules were to be built up upon the hypothesis that the 1913 standard of revenue would be produced as the result of the application of the charges there fixed; and consequently, if new exceptional rates were to be allowed they would, so to speak, trespass upon the provision made by the schedules of standard charges and involve a risk of the standard rate of 1913 not being reached. We know, of course, that historically the standard of 1913 has not been reached, but that does not affect the interpretation of the Act.

I agree entirely with what Romer L.J. has said as to the interpretation of s. 37, sub-s. 1. I think the matters to be considered under that subsection must, prima facie, be the same matters as had to be considered in fixing the various charges contained in the new schedules. There has been no indication in the Act down to that point of any new considerations. Then when you look at s. 38 you find provisions for modification of exceptional rates and very limited powers of other parties being allowed to be heard on those modifications. Then when you come to s. 39, as altered by the Act of 1933, you find certain bodies are given powers of representation, but always on the footing that those powers are to be exercised solely in relation to the rates which are being charged. As I put it to counsel in argument, it seems to me that the principle upon which Parliament has proceeded has been that, unless the shoe has been found to pinch by being worn, no representation shall be heard saying that there is anything the matter with its design. It is only after the shoe pinches that those other parties who are feeling the pinch have a right to represent to the Tribunal that the national or public interest, as the case may be, has been prejudiced by reason of their prejudice. I, therefore, entirely agree that in s. 37, sub-s. 1, there is no right given to the Railway Rates Tribunal to consider the matters in which the coastwise trade are interested. The argument for the appellants, to my mind, is an argument that it would have been good policy to give that power to the Rates Tribunal at that stage and, therefore, that we ought to find in the Tribunal a power that has come from the silence of the Legislature about it in s. 37, sub-s. 1. I think the only sound conclusion is that the silence of the Legislature means that the power is not given, and I, therefore, agree with the judgments which have been delivered and that the Appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Cleminson & Hill; G. J. Cole Deacon, Secretary to the Rates and Charges Committee.*

H. C. G.

C. A.

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Feb. 17, 18;
March 23.

APPENRODT *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE.

Rating—Licensed Premises—Valuation list—Monopoly value—Payment by annual instalments—Reduction in estimating the gross value for monopoly value—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 68.

The Rating and Valuation Act, 1925, s. 68, defines " gross value " as " the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

In April, 1932, the owner and occupier of an hotel obtained the grant of a new on-licence for five and a quarter years subject to the payment of 3000*l.* monopoly value made payable by five annual instalments of 600*l.* each. The question arose whether in fixing the value of the premises for the purposes of the valuation list the instalments ought to be taken into consideration by way of diminishing the estimated rent that a hypothetical tenant would pay and therefore the gross value :—

Held, that the liability for these instalments ought not to be taken into account in fixing the estimated rent.

So *held* by Lord Wright M.R. and Romer L.J. (Scott L.J. dissenting) on the ground that the annual instalments being payments necessary to maintain the premises as licensed premises, they came within the words " other expenses " to be borne by the landlord under the definition of gross value in s. 68.

So *held* by Lord Wright M.R. and Scott L.J. on the ground that the rent to be paid by the hypothetical tenant under s. 68 was in respect of the premises when licensed and therefore when embodying the monopoly value, so that the monopoly value must be borne by the landlord in order to secure the licence.

Decision of the Divisional Court (Lord Hewart C.J., Humphreys and du Parcq JJ.) [1936] 2 K. B. 447 affirmed.

APPEAL from the decision of the Divisional Court (1) on a special case stated by Middlesex Quarter Sessions under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

At the court of quarter sessions for the county of Middlesex holden at the Guildhall, Westminster, on January 23, 24 and 29, 1936, Hermann Appenrodt (hereinafter called " the appellant ") appealed against the decision of the Central

(1) [1936] 2 K. B. 447.

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Middlesex Assessment Committee (hereinafter called " the committee ") upon a proposal by the appellant to amend the entry in the valuation list for the borough of Hendon in respect of the Brent Bridge Hotel, which was gross value 2560*l.* and rateable value 2130*l.*

At the hearing the following facts were proved or admitted : the said hotel stood in its own grounds and contained a public restaurant, ball room and brasserie ; it was fully licensed and there were no comparable premises in the neighbourhood.

The appellant was both owner and occupier.

In April, 1932, he was granted a new justices' on-licence in respect of the hotel pursuant to s. 14, sub-s. 2, of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), for a term of five and a quarter years. The justices, pursuant to s. 14, sub-s. 1, of the Act, attached to the grant a condition that the appellant should pay, as the monopoly value of the hereditament, a sum of 3000*l.* in five annual instalments of 600*l.* In cases where the occupier of licensed premises is not the owner payments in respect of monopoly value are almost invariably made by the landlord.

Quarter sessions were of opinion that the assessment appealed against was excessive even if the said payments ought not to be taken into account ; on that basis the gross value would be 2278*l.* But they were of opinion that the said payments of 600*l.* ought to be taken into account and the gross value reduced to 1860*l.*, " on the ground that although the said payment was a capital sum, in this case it has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent." They therefore reduced the gross value to 1860*l.* and the rateable value to 1547*l.* The assessment committee appealed.

The question for the opinion of the Court was whether quarter sessions were right as a matter of law in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament. If the Court answered in the affirmative their decision was to stand ;

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if not, the gross value was to be increased to 2278*l.* and the rateable value to 1895*l.*

The Divisional Court (Lord Hewart C.J. and Humphreys and du Parcq JJ.) held that the payment in respect of monopoly value was a special statutory charge and a capital charge although payable by instalments, and that as it was not included in any of the payments enumerated in the definition of gross value in s. 68 of the Rating and Valuation Act, 1925, it must not be taken into account in fixing the gross value.

The appellant appealed. The appeal was heard on February 17, 18, and judgment delivered on March 23, 1937.

Comyns Carr K.C. and *Harold Williams* for the appellant. The decision of the Divisional Court is based on a fallacy, as will be shown by an examination of fundamental matters. It is clear from its form that a justices' licence does not of itself authorize the sale of intoxicating liquor, but it authorizes the licensee to hold an excise licence which does permit the sale of intoxicating liquors; secondly, the licence is always granted to the occupier; and thirdly, the payment of monopoly value is a condition of holding the justices' licence. The licensee cannot be made to pay a penny, but its payment is a condition of holding the licence. It may be contrasted in this respect with compensation duty which must be paid with the excise duty. Compensation duty is not, however, payable when a new licence is granted, as in the present case, but in order to obtain the excise licence the licensee must pay excise duty and an instalment of monopoly value when it is payable in instalments. Although the monopoly value is a capital sum paid once and for all for the duration of the licence, the fact remains that unless the licensee pays an instalment when seeking his excise licence it will not be granted to him. These matters are governed by the Licensing (Consolidation) Act, 1910. The justices' licence is granted under s. 14, sub-s. 2, and pursuant to sub-s. 1 the justices attached to the grant the condition as to payment of monopoly value. Sect. 21 deals with the compensation levy, and

Sch. III., Part II., gives the scale of deductions in respect of compensation levies so that the statute provides for their deduction from the rent payable, and no question therefore arises in that case as to their being taken into account in arriving at the gross value.

The vital point here is that the hypothetical tenant under s. 68 of the Rating and Valuation Act, 1925, takes over the right to the justices' licence and then in order to obtain the excise licence has to pay the monopoly value. That being so, the liability for the payment of the instalments must be a matter to be taken into account in arriving at the gross value. It is not contested that monopoly value is a capital sum: see *Rex* v. *Customs and Excise Commissioners* (1) and *Rex* v. *Taylor*. (2) Under s. 68 it is a fundamental principle that no further covenants can be implied than are there provided for, and the landlord's liabilities are to bear "the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command" the rent at which the property might reasonably be expected to let from year to year. The position being that the licence will lapse on non-payment of the monopoly value and the covenants make no provision for its payment.

[ROMER L.J. Is not the payment of the monopoly value obligatory on the owner in order to maintain the premises as licensed premises?]

No, because the hypothetical landlord will say to the hypothetical tenant that there is a licence which he can obtain and from which he will benefit by being able to sell intoxicating liquors, but that in order to obtain that licence the excise duty and instalments of monopoly value must be paid. It would make little difference if the landlord had paid the monopoly value in a lump sum, because although the tenant would escape paying instalments during the immediate term, he would know that he could not obtain a further term without paying monopoly value again for which he must make provision.

[ROMER L.J. It seems plain that unless the obligation to pay the instalments of monopoly is thrown on some one other than the tenant, it must reduce the rent payable by a hypothetical tenant. Is it then not a liability of the landlord as being necessary to enable the premises to command the rent within s. 68?]

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(1) [1913] 3 K. B. 483.

(2) [1915] 2 K. B. 593.

That provision in s. 68 relates only to the physical condition of the premises: *Waddle* v. *Sunderland Union* (1), and see also *Rex* v. *Shoreditch Assessment Committee. Ex parte Morgan.* (2)

[ROMER L.J. May it not mean in the case of licensed premises a liability necessary to maintain them as such?]

It is submitted not. The only person to whom the statute looks for payment of the instalments is the licensee, and that is the tenant, and he cannot get the excise licence without paying them. No stipulation can be imported into the hypothetical yearly tenancy except those provided for in s. 68. It is a fundamental principle that covenants cannot be imported into the lease: *Sunderland Overseers* v. *Sunderland Guardians.* (3)

In paying attention to the fact that monopoly value is a capital payment, the Divisional Court has had regard to an irrelevant consideration.

F. J. Tucker K.C., *Michael Rowe* and *Tottenham* for the assessment committee. The principle of valuation adopted by quarter sessions was that appropriate to making a valuation on a profit basis by reference to the balance-sheet of the business showing expenses and expenditure. In such a case, if it be found that the tenant has included an expense of a capital nature it is always excluded from consideration. That must be done as a matter of law, and the same applies here. Monopoly value is a payment of a capital nature whether it is paid in a lump sum or by instalments: *Rex* v. *Customs and Excise Commissioners.* (4)

[SCOTT L.J. A valuation on a profits basis is a method of making a guess at the assessable value, and no question of law is involved.]

Only if something is improperly included in arriving at the profits.

(1) [1908] 1 K. B. 642.
(2) [1910] 2 K. B. 859.
(3) (1865) 18 C. B. (N. S.) 531.
(4) [1913] 3 K. B. 483, 489; [1914] 2 K. B. 390.

Secondly, it is found in the special case that monopoly value is almost invariably paid by the landlord. In face of that how can it be said that it must be taken into account in considering what rent a hypothetical tenant would pay.

Thirdly, under the definition of "gross value" in s. 68 of the Rating and Valuation Act, 1925, the payment of the monopoly value is a landlord's expense as one necessary to maintain the hereditament in a state to command the rent. It is only so that the premises can continue to be licensed premises.

[LORD WRIGHT M.R. On that basis why does not this apply also to the payments for excise duty?]

Because the definition of "gross value" does not admit of this view. The above contention receives some support from *Rex* v. *Shoreditch Assessment Committee* (1), although the precise point did not arise, as that was a case under the Metropolitan Valuation Act, 1869, s. 47. There in considering the effect on value of an increased licence duty it was unnecessary to distinguish between its effect on gross value and rateable value. That applies also to the *Sunderland* case. (2)

Harold Williams replied.

Cur. adv. vult.

March 23. LORD WRIGHT M.R. In my judgment this appeal fails and should be dismissed. I have read, in addition to the judgments of the Divisional Court, those which have been prepared and are about to be delivered by Romer and Scott L.JJ. In these judgments the facts of the case are set out and I need not recapitulate them. I merely desire to state here, as briefly as I can, why I concur in the conclusion embodied in these judgments upon the difficult question involved in this case.

The question is put in the special case as one depending on the proper deductions to be made from the gross value as defined in s. 68 of the Rating and Valuation Act, 1925. On that basis I should agree with the reasoning of Romer L.J.,

(1) [1910] 2 K. B. 859.

(2) 18 C. B. (N. S.) 531.

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which follows the construction of the section adopted by the majority of this Court in *Waddle* v. *Sunderland Union* (1), and accordingly treats the payments under s. 14, sub-s. 2, of the Licensing Act as payments which under the hypothetical tenancy fall on the landlord and do not affect the rent which the tenant has to pay. I may here observe that in *Waddle's* case (1) the decision might have been reached by observing that by s. 21, sub-s. 3, of the Act the compensation charges under s. 21 fall eventually on the landlord because, though the tenant has to pay them together with and as part of the excise licence duties, the tenant is entitled to deduct them from the rent. This would in itself constitute an additional or even sufficient justification for the conclusion of the Court of Appeal in *Waddle's* case. (1)

There is no express provision in s. 14 defining whether the tenant or the landlord is in the first instance to make the payments under that section, or which party has eventually to bear them. As a matter of policy it would seem at least as fitting that they should fall on the landlord as that the compensation charges should so fall. But there is another and different way of looking at the matter, which supports the decision of the Divisional Court. The grant of the justices' licence in this case is for a term of five and a quarter years and is upon the condition of the payment of a monopoly value of 3000*l.* The character of such a payment under s. 14 of the Act has been discussed by this Court in *Rex* v. *Customs and Excise Commissioners.* (2) The justices have, in the words of Lord Cozens-Hardy M.R. (3), to fix "a lump sum, to be ascertained once for all, though when so ascertained it is competent to the justices in their discretion to say how that monopoly value is to be secured to the public and whether it is to be paid in one sum or in instalments." That latter course was in the present case adopted by the justices, who made the 3000*l.* payable in five annual instalments of 600*l.* each. But the sum fixed is, in the apt words of Lush J. in the Divisional Court in the same

(1) [1908] 1 K. B. 642.
(2) [1914] 2 K. B. 390.
(3) Ibid. 397.

case (1), "the capital sum which represents the monopoly value." "I should have thought" he continues, "that, when one speaks of the value which premises either do now bear or will bear when licensed, one refers to the sum which they would realise if converted into money, the market value, the sum which they are worth. One does not naturally think of that in the terms of rent, but in the terms of purchase money. Sect. 20 and sub-s. 1 (6.) of s. 14 point, I think, to the same conclusion." The Lord Chancellor expressed the opinion that the section referred to capital value in the case I have cited. Lush J. was there referring to *Inland Revenue Commissioners* v. *Truman, Hanbury & Buxton.* (2)

The materiality of this view, which indeed is only repeating the clear words of s. 14, sub-s. 1, is that the capital payment is based on the value of the premises and has directly nothing to do with annual value or with rent. The payment in a case like the present, where the grant is for a term under sub-s. 2 of s. 14, is peculiar in that, though it concerns the market value of the hereditament, it is limited to the number of years (not exceeding seven) for which the new on-licence is granted; a further similar charge for a further period of monopoly value may be imposed, it seems, at the expiration of the term. But the payment is to be estimated as representing the difference for the relevant purpose between the market value of the premises as licensed and as unlicensed. Now, the gross value on which the hypothetical tenant's rent is ascertained is in the case of licensed premises their gross value as licensed and for use as licensed premises. It is true that the annual charge of the excise licence is payable by the tenant and is to be taken into account as a deduction against the gross value in ascertaining the rateable value: *Rex* v. *Shoreditch Assessment Committee.* (3) That is an annual charge which the hypothetical tenant, who is notionally a tenant from year to year, may properly charge as part of his annual expenses; it is the payment which he has to make for the privilege of selling intoxicating liquors; but a payment

(1) [1913] 3 K. B. 483, 497.
(2) [1913] A. C. 650, 658.
(3) [1910] 2 K. B. 859.

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imposed specifically as representing the increased value of the premises when licensed, is something different. It is the precondition of the grant of the excise licence, because it is only to the holder of a justices' licence that an excise licence will be granted. The justices' licence is essential to give the premises the status necessary to enable a licensed victualler's business to be carried on. The rent paid is for the occupation of licensed premises; the landlord has to provide the premises for the tenant; that is, he has to provide the ground, the building, landlord's fixtures and so forth; all these enter into the value on which rent is payable; so also do intangible elements of value, such as those arising from favourable situation, goodwill (other than what is merely personal), and along with these the monopoly value arising from the justices' licence. These elements are all constituents on which the gross value is ascertained under the notional tenancy from year to year of the statutory hypothetical tenant; that is the starting point of capital value as distinguished from annual expenses either of landlord or tenant.

It may seem strange that the Act does not specify who is to make the payments under s. 14. The tenant must hold the justices' licence before he can get his excise licence. The Act did not concern itself with the original or eventual incidence of the charge required to be made to secure the justices' licence as it did in the case of the compensation payments. The Legislature was, it seems, content to secure that the monopoly value payments were a condition of the existence of the excise licence, and was content to leave the incidence of these payments to depend on the exigencies of the position. What has been the general course in practice appears in the special case, which says that where the occupier is not the owner the payments in respect of monopoly value are almost invariably in fact paid to the Commissioners of Inland Revenue by the landlord. This course seems to me to correspond to the realities of the position as I regard it. The monopoly value is an element in the value on which rent is paid. In the rent the hypothetical landlord gets the benefit of that value. It is reasonable that he should pay the cost of this monopoly value just as much as that of any other element of value in the hereditament which he lets. The hypothetical tenant who enjoys from year to year the monopoly value in the sense of earning profits, will pay in the rent what corresponds to the annual value of that monopoly value. His occupation will be valuable accordingly, and that value will be included in the rateable value, the rate being a rate on beneficial enjoyment from occupation.

This course of reasoning agrees in substance with that of the Lord Chief Justice and Scott L.J. It is an alternative to the reasoning by which Romer L.J. arrives at the same conclusion. I prefer the line of reasoning which I have just sought briefly to develop, but I do not dissent from that preferred by Romer L.J., if that alternative is adopted, as I think it should be, if the other is rejected. Whichever alternative is taken the result is that the appeal fails and must be dismissed with costs.

ROMER L.J. In the month of April, 1932, the appellant Hermann Appenrodt applied for a new justices' on-licence in respect of the Brent Bridge Hotel at Hendon in the county of Middlesex of which he is the owner and occupier. In due course the licensing justices granted the licence pursuant to s. 14, sub-s. 2, of the Licensing (Consolidation) Act, 1910, for a term of five and a quarter years, and pursuant to sub-s. 1 of the said section attached to the licence a condition that the appellant should pay as the monopoly value of the hereditament a sum of 3000*l.* by five annual instalments of 600*l.* each. The licence in the usual way authorized the appellant to hold an excise licence, and it required the first instalment of the monopoly value to be paid on taking out the first excise licence in pursuance of such authority, and the remaining four instalments to be paid on October 1 in each of the four years next following. It is provided by sub-s. 4 of the said section that a new justices' on-licence granted for a term under the section may be forfeited as therein mentioned if any condition imposed under the section

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is not complied with. On May 2, 1932, the licence was duly confirmed by the confirming authority.

By s. 68 of the Rating and Valuation Act, 1925, the "gross value" of a hereditament for rating purposes is defined as meaning "the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

The question to be determined upon this appeal is whether the annual instalments in respect of the monopoly value of the hotel should be taken into account in calculating the rent that a tenant such as is mentioned in the section last referred to would pay for the hotel. If the tenant would have to pay the instalment, it is plain that this question must be answered in the affirmative. Let me suppose that there are two licensed hereditaments precisely the same both as to earning capacity and otherwise, but that in one case the sum fixed as the monopoly value on granting the new justices' licence has been paid in one lump sum and in the other has to be paid by annual instalments. If in the latter case the instalments have to be paid by the tenant, it is obvious that he will not be prepared to pay the same rent as is paid by the tenant of the other premises. It was indeed argued on behalf of the respondents that, inasmuch as from an accountant's point of view the instalment of the monopoly value would be a payment on capital account, its payment would not affect in any way the trading profits earned by the tenant. But this consideration would be sorry comfort for the tenant whatever satisfaction it might offer to an accountant. Most assuredly it would not be an inducement to the tenant to pay as high a rent for the premises as he would have been willing to pay if he were free from liability for the instalments.

If, on the other hand, the tenant can throw the liability for the instalments on the landlord, it is equally plain that the rent which a tenant may reasonably be expected to pay for the hereditament will not be affected by the fact that the instalments have to be paid. The question, therefore, resolves into this. On whom will the liability ultimately fall—the landlord or the tenant? Now we are told in the special case that in practice the liability is "almost invariably" undertaken by the landlord. And this I can well believe. The landlord would find it difficult to get a tenant on any other terms. But for the purpose of ascertaining the gross value of the premises, the existence of a tenant willing to take them from year to year upon the terms stated in s. 68 of the Rating and Valuation Act, 1925, has to be assumed. Those terms would not impose upon the tenant any contractual obligation to pay the instalments; for assuredly they form no part of the "usual tenant's rates and taxes." But unless the terms impose a contractual obligation to pay them upon the landlord, the tenant would in fact have to pay them, or would at any rate enter upon his tenancy knowing that there was a strong probability that he would have to pay them. For one must assume that the landlord has refused to enter into an undertaking to pay them himself, and the tenant knows that if they are not paid the justices' licence will almost certainly be revoked and that he will in consequence be unable to obtain an excise licence.

In my opinion, however, the terms of the hypothetical tenancy do throw contractual obligation to pay the instalments upon the landlord. By those terms he undertakes to bear in addition to the costs "of repairs and insurance . . . . the other expenses (if any) necessary to maintain the hereditament in a state to command that rent." In the present case the hereditament in question consists of licensed premises, and if they cease to be licensed premises they will no longer be in a state to command the rent that a tenant would pay for such premises. It was contended on behalf of the appellant that the ejusdem generis rule should be applied and that the expression "the other expenses, if any," must be treated as including only expenses of the same genus as the expense of repairs and insurance. But I can see no reason

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for applying the ejusdem generis rule in such a case as this, even if I knew what is the genus of which repairs and insurance are species. I am not prepared to exclude from the "other expenses," which the landlord in the hypothetical tenancy agreement undertakes to bear, the instalment now in question. I am confirmed in this view by the judgment of Vaughan Williams L.J. in the case of *Waddle* v. *Sunderland Union* (1), a judgment with which Farwell L.J. expressed his agreement. That was a case arising under s. 1 of the Parochial Assessments Act, 1836, which provided that the Poor Rate should be made upon an estimate of the net annual value of the particular hereditaments to be rated, "that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." By s. 3, sub-s. 1, of the Licensing Act, 1904, it was made obligatory upon quarter sessions in each year, unless they certified to the Secretary of State that it was unnecessary to do so in any year, to impose in respect of all existing on-licences renewed, a charge as therein specified; and it was provided by sub-s. 2 of the section that such charge should be levied and paid together with and as part of the duties on the corresponding excise licence. The question that had to be decided in the case was whether in estimating the rateable value of licensed premises such charge could be deducted as being an expense necessary to maintain the premises in a state to command the rent thereof within s. 1 of the Parochial Assessments Act, 1836.

It was held by the Court of Appeal that the charge could not be deducted, but so far as Vaughan Williams L.J. and Farwell L.J. were concerned, solely because they regarded the charge as being part of the duty payable on the excise licence. Had they been able to treat the payment of the charge as being a condition necessary to be fulfilled before the justices' licence became operative, their decision would have been the other way. Vaughan Williams L.J., after reading s. 1 of the Parochial Assessments Act, 1836, said (1): "I cannot myself doubt that, notwithstanding the use of the words defining the deductions from the rent at which the rateable hereditament might reasonably be expected to let from year to year, the words 'other expenses,' etc., may apply to expenses not ejusdem generis with 'repairs and insurance,' and that the words 'necessary to maintain them in a state to command such rent' may include expenses which have no reference to maintenance in a physical condition to command the rent. Indeed, it is admitted that these words do so extend to analogous expenses in the case where the rateable hereditament is incorporeal: see *Reg.* v. *Goodchild* (2); *Reg.* v. *Smith* (3); and I myself have no doubt that, wherever the estimate of the net annual value of a rateable hereditament is based upon a condition not corporeal appertaining to the hereditament, such as a licence, or a canteen grant, one must in making the estimate, deduct expenses necessary for the accrual of the condition. The favourable condition, if it be such that it is to be taken into consideration in the estimate of the net rent, must be taken into consideration subject to a deduction of the cost of the accrual of that condition; and, if I had been of opinion that the increased value consequent upon the grant of the justices' licence did not become operative until the grant of the excise licence, and that the payment of the charge in question was by s. 3 of the Licensing Act, 1904, a condition precedent to the accrual of the value consequent upon the grant of the licence, I should have given judgment for the appellant."

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(1) [1908] 1 K. B. 642, 647.

With those observations I desire to express my respectful concurrence. Applying them to the present case the instalments are an expense necessary for the accrual to the hotel of the incorporeal condition of being licensed premises. That favourable condition of the hotel has to be taken into consideration in the estimate of the rent which it may reasonably be expected to command, and the expense of maintaining it in that condition is one of the expenses to be undertaken by the landlord within the meaning of s. 68 of the Rating and Valuation Act, 1925. The Divisional Court came to the conclusion that the liability for the instalments was not one that would fall upon the hypothetical tenant and could not, therefore, be taken into consideration in estimating what rent he might reasonably be expected to pay for the hotel. With that conclusion, though for somewhat different reasons, I agree. In my opinion the appeal fails and should be dismissed.

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(1) [1908] 1 K. B. 649.
(2) (1858) 27 L. J. (M. C.) 233.
(3) (1885) 55 L. J. (M. C.) 49.

Scott L.J. (1) The appeal is by the occupier, who objects that the figure contained in the valuation list for the gross value of the Brent Bridge Hotel, Hendon, of which he is both owner and occupier, is excessive. The respondents are the assessment committee. The hotel is fully licensed, a new justices' licence having been granted to the appellant in 1932 under s. 14, sub-s. 2, of the Licensing Act, 1910, for a term of five years and a quarter, the monopoly value to be paid being fixed at the sum of 3000*l.*, payable in five instalments of 600*l.* each.

In the year 1935, the hotel then standing in the valuation list at 2600*l.* gross value and 2163*l.* rateable, the appellant made to the respondents a "proposal" under s. 37 of the Rating and Valuation Act, 1925, for reduction on the ground that the liability to the above payments made the figures in the valuation list excessive. The respondents made a small reduction, to 2560*l.* gross and 2130*l.*, but refused to reduce further. The appellant then appealed to quarter sessions, and in January, 1936, the statutory committee of quarter sessions went into the matter afresh and stated a case for the High Court. In this they said that they reduced the figure for gross value to 2278*l.*, if the payment for monopoly value ought as a matter of law to be ignored; but if, as they thought themselves, it ought to be taken into account, then the figures should be 1860*l.* gross and 1547*l.* rateable. The Sessions do not explain their reasoning very clearly or quite

(1) The judgment was read by Romer L.J.

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consistently. In para. 3 they describe the appellant's contention as being that "the payment of the said 600*l.* per annum in respect of monopoly value was the transfer to the public of the additional value added to the hereditament by the licence and would therefore be the first charge to be considered in any negotiation as to the rent. It should therefore be treated as one of the normal working expenses of the tenant." In para. 4 they record the respondents' argument in the following terms: "that as between the hypothetical landlord and tenant the premises must be deemed to be licensed and any payments for monopoly value or otherwise to obtain such licence must be deemed already to have been made or, alternatively, that the said payment ought not to be included as a working expense in that it was a capital sum, or an instalment of a capital sum, and whether regarded as payable by the landlord or the tenant ought not to be taken into account in estimating the rental value of the said hereditament." In para. 5 they in effect find an agreement between the parties before them that if the 600*l.* is to be regarded as a working expense of the tenant's business, the consequential diminution in the figure for the hypothetical rent will be 418*l.* In para. 6 the Sessions state their reasons and conclusions on the relevant issue thus: ". . . . we were further of opinion that the said payment ought to be taken into account and that the said gross value ought to be reduced accordingly to 1860*l.* on the grounds that, although the said payment was a capital sum, in this case it has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent. We therefore allowed the said appeal and reduced the gross value of the said hereditament to 1860*l.* and the rateable value thereof to 1547*l.*, but we made no order as to costs."

The above statements of facts and reasons are not as clear as they might have been, but some further light is thrown upon them by the form of the question submitted in para. 8: "The question for the opinion of the Court is whether we were right as a matter of law in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament. If the Court answers such questions in the affirmative our decision is to stand. If not, the Court is requested to vary our order by increasing the gross value determined by us to *2278l.* and the rateable value to 1895*l.*"

In spite, however, of slight obscurity and confusion in expression, the substance of the special case is plain enough. The appellant's claim for a reduced gross value is based on the argument that the condition in the licence requiring payment for monopoly value made the licensed trade of the hotel so much the less profitable—in short, that what the justices gave with one hand they took away with the other in order to transfer it to the public in the form of cash; that therefore, in considering what a hypothetical tenant wanting the premises in order to conduct a licensed victualler's business there would consent to pay by way of rent, it would, as a matter of business or economics, be absurd not to recognize that his offer for the tenancy would be affected by the knowledge that directly or indirectly the 600*l.* a year would have to come out of the trade profits. This is what they mean by calling the liability the first charge to be considered "in any negotiation as to the rent." So interpreted, the Sessions accept the appellant's claim as sound in fact and law, subject to the legal question which they submit to the Court. Left to themselves, they would plainly have reduced the gross value by 418*l.* Whether this conclusion is right or not is the question in the appeal, and the question is in many aspects a difficult one, although I have no doubt that the conclusion reached by the Divisional Court was right.

There is only one other finding to which I need call attention; it is in para. 2, sub-para. 4: "In cases where the occupier of the licensed premises is not also the owner, the payments in respect of monopoly value are almost invariably in fact paid to the Commissioners of Inland Revenue by the landlord." As nearly all licensed houses are to-day owned by brewers and either let to tied tenants, or occupied by the brewer and managed by the brewer's own servant, it is inevitable that the fact should be as stated in the sub-paragraph; but in my view it has no legal bearing on the questions we have to decide.

We may assume—and I think were told by counsel—that the figure for the hypothetical rent had in the present, as in practically all cases of public-houses to-day, been assessed by first estimating the probable trade which it was likely would be done at the Brent Bridge Hotel, and then making a further estimate of the proportion of that figure which would probably be paid as rent for the particular house. This method of valuing public-house property is to-day recognized as the only practicable way of getting at values, whether the objective be capital value or annual value. It is lucidly explained by Kennedy J. in *Ashby's Cobham Brewery Co.* (1), where capital value was the objective, the valuation being required for the purpose of assessing the capital amount payable by way of compensation for the refusal of an old licence under s. 2 of the Licensing Act, 1904 (now s. 20 of the Act of 1910). That judgment has always been recognized as a sound exposition of the principles applicable to public-house valuation. The cases of *Parr* v. *Leigh Union* (2) and *Cartwright* v. *Sculcoates Union* (3) are instances where the same method was applied to the ascertainment of annual value for rating purposes. And in *Truman, Hanbury, Buxton & Co., Ld.* v. *Inland Revenue Commissioners* (4) the Court of Appeal held, affirming Hamilton J., that the annual licence value must be ascertained for the purpose of the excise duty imposed by ss. 43 and 44 and the First Schedule of the Finance (1909–10) Act, 1910, in accordance with the principles laid down in *Ashby's Cobham Brewery Co.'s* case. (5) As long as "the basis" of value (the phrase used in s. 44, sub-s. 2) is the same there is no difficulty for a practical valuer in converting annual value into capital value, or vice versa. The vital question is to ascertain what are the component elements of

(1) [1906] 2 K. B. 754, at pp. 761 to 764.

(2) (1905) 1 Konstam (Rating Cases) 211.

(3) [1899] 1 Q. B. 667; [1900] A. C. 150.

(4) [1912] 3 K. B. 377.

(5) [1906] 2 K. B. 754.

value. A capital liability can always be brought into annual accounts by the device of interest and sinking fund.

We may accordingly picture the valuers on the two sides before the Sessions giving evidence first as to what they thought on the facts in evidence was a fair figure for the profits of the hotel, and then as to the percentage of that figure which might properly be considered a probable rent for the tenant to pay; so that if they first assessed profits at, say, *x l.* and then estimated the proportion which the hypothetical tenant would want for himself and family and savings at 30 per cent., they would reach the conclusion that the hypothetical tenant would be willing to close negotiations with the hypothetical landlord at *x l.* minus 30 per cent.; and on this ratio of 100 : 70 between profits and rent it would seem from para. 5 of the Case as if the two sides were in agreement, as a reduction of 418*l.* in the hypothetical rent as a corollary of a reduction of 600*l.* in the profits is a reduction in about that ratio.

The quarter sessions have, I think, in effect, expressed the view, subject to the question of law, that the payment of the 600*l.* at the beginning of each of the five years would necessarily come out of the licence holder's profits of the year, and they have concluded accordingly that that prospect would reduce the rent the hypothetical tenant would pay by 418*l.*, or say 70 per cent. of the reduction in profits.

The Divisional Court have, however, decided that the amount of rent which the hypothetical tenant would be willing to pay is not in law affected by the payments of monopoly value. The main reason for the decision, as explained by the Lord Chief Justice, was that a payment to be made for monopoly value is, according to the decision of the Divisional Court, affirmed by this Court, in *Rex* v. *Customs and Excise Commissioners* (1), and followed by Lord Reading in *Rex* v. *Taylor* (2), a capital payment, whether payable in one sum or in several instalments. The learned Chief Justice concluded his judgment thus (3): "But the one thing that

(1) [1913] 3 K. B. 497; [1914] 2 K. B. 390.

(2) [1915] 2 K. B. 593.

(3) [1936] 2 K. B. 477, 455.

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is clear about it is that it is a part of capital value, and in those circumstances it seems to me that it is impossible to hold that the sum should be taken into account by way of deduction when the question is asked: What would the hypothetical tenant be prepared to pay by way of rent? I think, therefore, that the question which is put to us should be answered in the sense that the Court below came to an erroneous conclusion in point of law, and that the order of that Court should be varied in the manner indicated in the Case—namely, by increasing the gross value determined by that Court to 2278*l.*, and the rateable value to 1895*l.*"

Humphreys J. expressed agreement with the Lord Chief Justice and explained his opinion on the point by saying, first, that he found it very difficult to bring monopoly value into the language of the definition clause, and, again, a little later in his judgment (1), that the monopoly payment "made by the person who obtained the licence "was" a payment quite outside and not in the contemplation of the definition of gross value."

du Parcq J. took the same view as the other two learned judges about the capital nature of the monopoly payments and the consequential legal necessity of excluding them from an annual assessment; but he added an additional reason of his own to the effect that the hypothetical tenancy being from year to year and the monopoly value being a capital item, the landlord would in fact pay it and then put up the rent to the tenant in consequence.

The view of the Divisional Court thus was that "the monopoly value" is in its nature a capital asset, that a lump sum payment for it is a capital item, and that the sub-division of such a payment into instalments to be paid year by year during the period of the licence does not convert them into true annual liabilities, or prevent their still being instalments of a capital item. Taking these views they drew the conclusion that the capital nature of the payments necessarily prevented their being taken into consideration in the ascertainment of the hypothetical rent. I agree that instalments of a lump

(1) [1936] 2 K. B. 458.

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sum payable for monopoly value under s. 14 of the Licensing Act, 1910, are not annual payments in the accountancy sense, although for reasons which I will give in a moment I do not agree that either the instalments or the lump sum payable under sub-s. 2 are necessarily capital payments. But I cannot agree that the accountancy test of capital or annual payments of itself affords a complete solution of the problem which we have to solve.

Apart from s. 14, I do not doubt that the monopoly value of the licence may often properly be regarded as a capital asset—as, for instance, on a valuation for estate duty under s. 7 of the Finance Act, 1894; but I do not think that payments in respect of monopoly value made to the Excise pursuant to conditions attached to the grant of a period licence under sub-s. 2 of s. 14 of the Licensing Act, 1910, are necessarily capital payments in the true sense. That sub-section differs materially from the first sub-section. Under sub-s. 1 a new licence is granted for a year. At the end of the year it is no longer a new licence and application must be made for its renewal as an old licence under the provisions of s. 16. Consequently the monopoly payment to be exacted on its first grant as a new licence must cover the whole monopoly value. Once that payment has been made the condition of the original licence is performed and no further monopoly payments can be exacted when the licence comes up for renewal.

On the question whether the lump sum payment under sub-s. 1 is necessarily and always a capital payment, we need express no opinion in the present case; and even in the case of *Rex* v. *Customs and Excise Commissioners* (1) I do not think that the members of the Court of Appeal used the epithet "capital" in their judgments, although Lord Reading in 1915 did so in *Taylor's* case. (2)

But when a licence is granted for a term under sub-s. 2 the position is radically different. In para. (*a*) of that sub-section it is expressly provided that on the expiration of the period there will be no right of renewal, but on the

(1) [1914] 2 K. B. 390.

(2) [1915] 2 K. B. 593.

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contrary that the application for re-grant shall be treated as an application for the grant of a new licence; thus again bringing into operation the whole of the machinery of the section for exacting monopoly payment. This plan was, I presume, adopted in order to give the justices an opportunity of finding out by experience of trading results during the period what the real value of the monopoly is, and to enable them to adjust the ultimate total payment to the known result. As they have an unfettered discretion as to how they secure payment of the monopoly value during the period, I can see nothing to prevent their providing in each year for payment of an amount which they estimate will be the equivalent of the annual value of the monopoly in that year, if they so choose. But whether they make it a lump sum for the period payable once for all or by instalments, or an annual payment proper at the beginning of each year, seems to me immaterial. It shows, at any rate, that a payment under sub-s. 2 is not necessarily a true capital payment.

There was a further point discussed in the judgments below—namely, the question of whether the five annual payments fell within the actual wording of either of the two categories of payments expressly mentioned in the definition, one set payable by the tenant, the other by the landlord. I agree in the conclusion at which they arrived, that the monopoly payments do not fall within either set of words. The monopoly payment is obviously not a "usual tenant's rate or tax"; and I do not think it is an expense of the kind intended to be covered by the words referring to the landlord's undertakings. If I am not precluded by authority from expressing it, my own view is that the words "other expenses" cannot be read without regard to the presence of the two words "repairs" and "insurance" which precede them. The ejusdem generis rule is a particular application of the maxim of interpretation "noscitur a sociis." A word used in one context may bear a different meaning to that which it will bear in another, and I do not think the word "expenses" following those two words has so wide a meaning as if they had been omitted. The application of the ejusdem generis rule is in truth a matter of degree. I think this is what Kennedy L.J. was in effect saying in *Waddle's* case (1), and I read the observation as showing some disagreement with the more absolute view expressed by Vaughan Williams L.J. and Farwell L.J. (2) But even if the ejusdem generis rule be wholly excluded, as the two latter Lords Justices held (and it may be that their view is binding upon this Court), I still regard the monopoly payments as a different kind of payment to one "necessary to maintain the hereditament in a state to command the rent." *Waddle's* case (1) was not on the same point as the present appeal. It turned on a question of rateable value only, that is to say on deductions from gross value for the purpose of arriving at rateable value. It is also relevant to the present question to note the emphasis which Kennedy L.J. in *Waddle's* case (3) laid on the fact that the compensation levy was imposed as a personal liability upon the holder of the licence (see Licensing Act, 1904, s. 3, sub-s. 2, now s. 21, sub-s. 2, of the 1910 Act). So here I think that the payment of monopoly value to the Excise Commissioners, whether it is or is not made a debt from the licence holder to the Crown, is a condition of the personal licence granted by the justices to the licensee to carry on the business of a licensed victualler at the named premises, and does not affect "the state of the hereditament." There is a further point also. The word "maintain" is clearly not appropriate to an initial payment of the whole monopoly value made upon a grant of a new licence for a year under sub-s. 1 of s. 14. That payment is made once and for all not for maintaining the licence but in order to bring it into operation. Neither has the payment any recurrent aspect, such as is predicated by the word "maintain," and as characterizes the two objects of payment mentioned in the definition of gross value—namely, insurance premiums and repairs. And it must not be forgotten that under the Parochial Assessments Act, 1836, the very words contained in the present definition of gross value, for describing the burden which it must be assumed the landlord will bear,

(1) [1908] 1 K. B. 642, 652.
(2) Ibid. 649, 650.
(3) Ibid. 642.

were the measure of deductions from gross value which produced "net annual value"—the former name for what s. 22 of the present Act calls "rateable value." The language of s. 1 of the 1836 Act was this: "The rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." The words "probable average annual cost of" in the above provision of the 1836 Act, which for ninety years afforded the criterion of net annual value, in my opinion support the conclusion that we can get no help from the words relating to the landlord's supposed undertakings in the present definition of gross value.

There was one other aspect discussed with which I must deal shortly, in view of certain passages in the judgments of my two colleagues. It was argued for the respondents that the payments, whether a capital payment or not, affected the landlord as owner of the property, but not the tenant, as occupier of the premises and holder of the licence; that both in business and in law it must be assumed that the landlord would make the payment, and that accordingly the hypothetical tenant could not say that it diminished his profits or affected his rent. Whether this argument is legally sound or not must depend primarily on whether the relevant statutes put the obligation on the landlord or the tenant or on neither. I have considered the enactments which are or might be relevant, beginning with ss. 14, 20 and 21 of the Licensing Act, 1910; and including ss. 43 and 44 of the Finance (1909–10) Act, 1910, which deal with licence duty, also ss. 6 and 7 of the Finance Act, 1911; s. 12, sub-s. 1 (*b*), of the Finance Act, 1924, which provides that the annual value for calculation of licence duty shall be ascertained in the same way as gross value for rating purposes, and s. 14 of the Finance Act, 1934, which empowers the Commissioners of Customs and Excise to reduce an assessment of annual value, and in the event of over-payment to refund the overpaid amount. It does not say to whom the refund is to be made, but presumably to the licence holder who paid the duty. This last provision is on similar lines to the provision in s. 47 of the Finance (1909–10) Act, 1910, which authorizes the Commissioners of Customs and Excise to reduce and give credit in respect of either annual or capital payments of monopoly value, where the increase of excise duty under that Act caused a decrease in the real monopoly value.

The general scheme of these various provisions seems to support the view that in s. 14 of the Licensing Act an obligation is impliedly imposed on the licence holder to pay the monopoly money. There is, however, one provision in the Licensing Act, 1910, which points the other way. Sect. 21 of that Act constitutes the compensation fund for old licences, and empowers the Compensation Authority to impose a levy in respect of all old on-licences at certain rates. Sub-s. 2 says that these charges are to be " levied and paid together with and as part of the duties on the corresponding excise licence " (the corresponding provision in s. 3 of the Licensing Act, 1904, being that to which Kennedy L. J. referred in *Waddle's* case (1)). In s. 14 there is no equivalent provision in respect of monopoly payments. The contrast is noteworthy. Possibly Parliament thought that the licensee's inability to carry on his business without his excise licence, and that the impossibility of his getting that licence without paying the monopoly money at the same time as he pays his excise duty are sufficient sanction to ensure payment, and therefore that it was not necessary to create any direct pecuniary obligation.

But in my view it is not necessary to decide which construction of the section is right. The fact that the excise licence will not be forthcoming unless the licensee actually hands the monopoly money with the excise duty to the collector is enough to create a business necessity for the licence holder himself to make the payment; and that prospect is one which a free tenant (and the hypothetical tenant is a free tenant) could not help having in mind when bargaining for a tenancy of a newly licensed house in respect of which no monopoly payment had yet been made to the Excise, if that is the proper moment at which to investigate the hypothetical tenant's state of mind; for, in my opinion, whether it is the proper moment or not is the one and only question on which this appeal really depends. In one view of that moment the mere fact that the monopoly payment may be a lump sum payment equal to the whole value of the licence (as under s. 20 in the case of an old licence not renewed) does not prevent its being an element which must affect the hypothetical tenant's profit and loss account, and, therefore, his rental offer based on his estimated profit. If the moment of time at which the definition of gross value requires the tenant's rental offer to be ascertained is when the payment of monopoly value is still a liability, still prospective and not a *fait accompli*, he will perforce take it into his reckoning and reduce his rental offer, and at that decisive moment it will make no difference except of amount whether the liability be a capital or an annual item. No lump sum payment which is not truly an annual item can of course figure as such in the hypothetical tenant's supposed profit and loss account; but that does not mean that to a hypothetical tenant bargaining for the tenancy of a house, in respect of which a new justices' licence is about to be granted under s. 14 of the Licensing Act, 1910, such a lump sum payment would be irrelevant. He would inevitably take the common-sense view that the goodwill of the trade when he got the place would be worth so much less to him if he had to pay, for example, 3000*l.*, than if he had to pay nothing; he would be forced to take it into consideration and do that by setting against the estimated profits an annual charge representing interest and sinking fund on the lump sum. It must be presumed, therefore, in the case I have supposed, that the hypothetical tenant viewing the premises at the outset would act like an ordinary business man and debit his profits not with the lump sum or even an instalment of it, but with a proper annual item to represent the annual burden of the whole lump sum.

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(1) [1908] 1 K. B. 642, 651.

It follows, therefore, that if the psychological moment when the hypothetical tenant's mind would be affected so as to cause a reduction in his rental offer is also the proper legal moment to inquire, it does not matter whether the prospective payment is capital or annual or something sui generis and between the two; whatever it be, it would tend to reduce the assessment; the only question open being one of amount.

Thus the critical question on which the appeal depends is, What is the moment of assessment contemplated in the definition? The rival views may be stated as contentions of the two parties to the appeal.

The appellant's contention: "The business view should be taken; no sane man taking the tenancy would ignore the capital liability. The hypothetical tenant would certainly give less rent if he had to face such a charge on his profits."

The respondents' answer: "Your hypothesis does not fit in with the statutory position. The hypothetical tenant has not got to face the charge at all. So far as he is concerned it is past history. He is bargaining in the market for a licensed not an unlicensed hereditament, for a hereditament possessing monopoly value because it is earning monopoly profits; and that involves the assumption that not only the justices' licence but also the excise licence has already been granted, and, therefore, the payment required by the former duly made, in order to comply with its conditions adapted for securing to the public the monopoly value; for the Licensing Act and the Finance (1909–10) Act, 1910, together make it impossible for the house to be effectively licensed until the monopoly money is paid to the Commissioners of Customs and Excise."

In my view the above restatement of the respondents' argument is the sound view. The resultant position is almost as if all monopoly rights to be enjoyed under new licences had been nationalized by law, and as if the monopoly right of the house in question had been sold by the Government to the parties interested in the house the day before the licensee began business. If that analogy be legally apposite, it would seem to put the acquisition of the monopoly on the same footing as any capital improvement of the property effected before the licensed house was open for business, such as a swimming-pool. In the supposed case the swimming-pool would increase the profits of the business whether the cost of its construction had been paid for or not, and it is submitted that the same reasoning is applicable to the acquisition of the monopoly. By increasing the profits each must tend to put up the annual value of the hereditament whether paid for or not; the past cost is past history and not relevant as a factor tending to diminish the present value of the licensed hereditament.

The above reasoning seems to me to show that the point of time, at which we ought under the Rating and Valuation Act to picture the hypothetical tenant taking stock of his position and making his bargain with the hypothetical landlord, is after the monopoly payment has been made, and if so, it must be irrelevant.

Another way of stating the same legal view is to say that what is to be valued is the licensed hereditament as it stands, rebus sic stantibus, an effectively licensed house. If the proper moment of time for assessing rental value were before any payment for monopoly value were made, so as to cause a reduction in gross value of the hereditament, the ridiculous result would follow that as soon as the payment had been made the gross value would go up and justify a proposal by the assessment committee under s. 37 to increase the assessment. The absurdity of this result corroborates the conclusion that the monopoly payment whether in one lump sum or in instalments is not germane to the assessment of gross value.

In the present case, at the date of the proposal by the appellant for a reduction of his gross value in the valuation list, I gather that two at least of the five instalments had in fact been paid to the Revenue; and in regard to them the position must be the same in principle as if all five had been paid. The answer which I think ought to be given to the question put in the special case is that the 600*l.* payment should not be " taken into account in diminishing the rent a hypothetical tenant would otherwise pay for the said

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hereditament." I, therefore, agree with the conclusion of the Divisional Court, and think that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal was given.

Solicitors: *Rye & Eyre; Blundell, Baker & Co.*

H. C. G.

MERSTHAM MANOR, LIMITED *v.* COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

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Feb. 4, 5, 6;
April 7, 8;
May 22.

Highway—Dedication—" Way . . . . deemed to have been dedicated as highway "—Actual enjoyment by public as of right and without interruption for twenty years—Rights of Way Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-s.* 1.

By the Rights of Way Act, 1932, s. 1, sub-s. 1: " Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way."

To bring a case within this sub-section, the person asserting the right of the public to use the way must establish, on the one hand, that the public have actually had the amenity or advantage of using the way openly and not secretly or by force or with permission given from time to time and without interruption, in the sense of actual and physical stopping, of their enjoyment of the way, and, on the other hand, the actual suffering of the exercise of that right by the landowner for a full period of twenty years.

Dicta of Stirling J. in *Smith* v. *Baxter* [1900] 2 Ch. 138, 144 (quoting the words of Kay J. in *Cooper* v. *Straker* (1888) 40 Ch. D. 21, 27); of Cotton L.J. in *De La Warr (Earl)* v. *Miles* (1881) 17 Ch. D. 535, 596; of Parke B. in *Flight* v. *Thomas* (1840) 11 Ad. & El. 688, 699; and of Lindley L.J. in *Hollins* v. *Verney* (1884) 13 Q. B. D. 304, 308, applied.

ACTION tried by Hilbery J. without a jury.

The plaintiffs were the owners of an estate within the district of which the defendants were highway authority. A roadway which joined two highways ran across the plaintiffs' estate. In 1934 the plaintiffs, claiming that the roadway was their private property, erected a fence at one end of it and a gateway at the other. The defendants removed both the fence and the gateway.

The plaintiffs thereupon brought this action against the defendants claiming damages for the wrongful entering by the defendants of the plaintiffs' land and for the defendants using the private roadway of the plaintiffs and removing the gate, gate-posts and fence of the plaintiffs. By their defence, the defendants said that the roadway in question was not a private way but a public highway, that the gateway and the fence erected by the plaintiffs obstructed that highway, and that the defendants, in removing the gateway and fence, were acting in performance of the duties imposed on them by the Local Government Act, 1894.

W. Marshall Freeman and *A. W. Nicholls* for the plaintiffs.
Turner K.C. and *Erskine Simes* for the defendants.

Cur. adv. vult.

May 22. HILBERY J. read a judgment in which he stated the facts and continued: The plaintiffs say that the defendants, who are the highway authority for the district in which this roadway is situated, wrongfully claim to use the road in question as a public highway and threaten, and intend to repeat, acts which the plaintiffs say are acts of trespass. The defendants justify those acts, asserting that they are, as they are conceded to be, the highway authority for the district, charged by the Local Government Act, 1894, with the duty of protecting all public rights of way within their district and preventing so far as possible the stopping-up or obstruction of any such right of way, and that the roadway in question is a public highway.

The acts of trespass of which the plaintiffs complain are the removal by the defendants of a gate and gate-post at the northern end of the roadway in question, and a fence at the southern end of the roadway. It is conceded that, if the roadway in question is properly to be considered to be a public highway, the removal of the gate and fence in question by the defendants was an act done by them in pursuance of their duties as the highway authority and was an act which

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they were required to do by law. The only issue, therefore, which has to be decided by me is whether the roadway in question is a public highway. In the circumstances it was agreed that the burden of proof was on the defendants.

The defendants put their case in two ways. First, they contend that the evidence in the case should be held to establish at common law that this roadway is a public highway. Secondly, they say that their evidence establishes that this should be deemed to be a roadway dedicated as a public highway under the Rights of Way Act, 1932. There is not, I think, any dispute between the parties as to what the common law requires in order that the defendants may be said to have established that this roadway has become a public highway, nor do I think there is any serious dispute between the parties (except, perhaps, with regard to one matter) about what the law requires if I am to find that this should be deemed to be a public highway under the Rights of Way Act, 1932.

The defendants accept that at common law the burden is on them to show a long-continued user in such circumstances that an inference should be drawn from it that the owner of the land has intended to dedicate the roadway to the public for their use. From one of the several cases cited to me I take a passage which, I think, as succinctly as possible expresses what the law is. I quote from Lord Kinnear's speech in *Folkestone Corporation* v. *Brockman* (1): "The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by Lord Blackburn in *Mann* v. *Brodie.* (2) He begins by citing the doctrine laid down by Parke B. in *Poole* v. *Huskinson* (3): 'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence and no more.' And then he adds more particularly with reference to the effect of user, that 'where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he was.'" As was observed by Lord Kinnear in his speech in the case I have already cited in dealing with this question from the common law point of view (1): "The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee." And he goes on to quote with approval this passage from the speech of Lord Halsbury L.C. in *Macpherson* v. *Scottish Rights of Way and Recreation Society, Ld.* (2): "The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public."

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(1) [1914] A. C. 338, 352.

(2) (1885) 10 App. Cas. 378, 386.

(3) (1843) 11 M. & W. 827, 830.

In considering the evidence in this case I have applied those principles and borne in mind the further observation to which Lord Kinnear directs attention—namely, that the question is whether such user as has been proved is to be ascribed to tolerance or right. (3)

In the second place the defendants, as I have said, base their case on the Rights of Way Act, 1932. They contend that both under s. 1 and s. 2 they have satisfied the requirements of the Act. Sect. 1 provides as follows: "(1.) Where

(1) [1914] A. C. 352.
(2) (1888) 13 App. Cas. 744, 746.
(3) [1914] A. C. 353.

a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way. (2.) Where any such way has been enjoyed as aforesaid for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way."

A consideration of the evidence from the point of view of whether or not it establishes a case for the defendants under the Rights of Way Act, 1932, requires, I think, that I should first decide what it is that that Act requires should be established by evidence before the way shall be deemed to have been dedicated as a highway. Sect. 1, sub-s. 1, as I have pointed out, enacts that where a way such as is therein referred to, and such as is the one in dispute in this action, has been "actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way."

In the first place, it is necessary to decide how the words "actually enjoyed by the public as of right" are to be construed. These words, it was pointed out to me, are reproductions of the language used in the Prescription Act, 1832. As used in that Act they have been the subject of judicial interpretation, though I cannot find that they have been the subject of judicial interpretation in their context in the Rights of Way Act, 1932. When considering these words as used in the Prescription Act, 1832, Lindley L.J., delivering the judgment of the Court of Appeal in *Hollins* v. *Verney*,

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said (1): " Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption." A little later on the learned Lord Justice said: " The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury." That language seems none the less applicable where, as here, the actual user which has to be considered is by members of the public generally and not by some one individual in particular. Moreover, in the Prescription Act the expression is used in connection with a topic very similar to that with which the Rights of Way Act, 1932, is dealing in s. 1. I think it is right, therefore, to interpret those words as involving that he who asserts the right must establish as a matter of fact, on the one hand, the actual enjoyment of the right by the public as of right and, on the other hand, the actual suffering of the exercise of that right by the landowner for the full period of twenty years. I take the word " enjoyed " to mean, as Stirling J. said in *Smith* v. *Baxter* (2), " having had the amenity or advantage of using."

In the second place, what is the meaning of the qualification on the actual enjoyment by the public expressed in the Act by the words " as of right " ? Speaking of the same qualification in the Prescription Act, 1832, in *Earl De La Warr* v. *Miles* (3) Brett L.J. said: " The true interpretation of those words ' as of right ' seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shows that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said 'You may do it' or not; he has proved all that it is necessary for him to prove."

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(1) (1884) 13 Q. B. D. 304, 308.

(2) [1900] 2 Ch. 138, 144.

(3) (1881) 17 Ch. D. 535, 591.

It is the requisite quality of the act, not merely the act itself, which is here defined. It is easier for me to appreciate the presence of those words in the Prescription Act, 1832, dealing as it does with whether rights have been acquired in respect of one tenement and against another because of acts done over a period by owners of the one tenement, than their presence in the Rights of Way Act, 1932, dealing with the acts of members of the public, no matter how or whence they come, or why they go along the way, and who may individually use the way but once, and that by chance. However, I think it is plain that the words "as of right" require that the quality of the acts, as well as the acts, must be established.

The essential quality of the acts—that is, as acts done as of right—has from early days in our law been established by showing that the acts were done openly, not secretly, not by force and not by permission from time to time given. In Coke on Littleton (19th ed., p. 114 (*a*)) Lord Coke expresses the requirements thus: "Longus usus nec per vim, nec clam, nec precariò." There is a long line of cases which supports this view, and I take from one of them a passage which occurs in the judgment of Cotton L.J. in *Earl De La Warr* v. *Miles* (1), where he says: "You must see whether the acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done."

I think it right, therefore, to hold that, where the words "as of right" are used in the Rights of Way Act, 1932, in connection with the actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given.

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(1) 17 Ch. D. 596.

Finally, there are the words "without interruption" to be interpreted. In the first place, do they refer to the enjoyment of the right or to the period of that enjoyment? Is it sufficient to amount to interruption if acts have from time to time been done which, while not stopping the user from going on, have yet challenged the right? Or must the interruption, to come within the meaning of the Act, be actual and physical stoppage of the user for a time, or from time to time?

These words, again, occur in the Prescription Act, 1832. When used in that Act they are qualified by s. 4 of the Act, which enacts that no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made.

Of the words when used in the Prescription Act, 1832, Parke B. said: "Section 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period": *Flight* v. *Thomas.* (1) But under the Rights of Way Act, 1932, there is no section equivalent to s. 4 of the Prescription Act, 1832. The words in s. 1 are "has been actually enjoyed by the public as of right and without interruption for a full period of twenty years." In their context they occur, however, as qualifications of the actual enjoyment of the way by the public, rather than as qualifications of the period. The scheme of the section appears to be that the actual enjoyment of the way must in character be two things—that is, of right and without interruption, and, when an enjoyment of a nature satisfying those two requirements has been proved, the duration of that enjoyment must be shown to have been for a full period of twenty years. Moreover, public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the

(1) (1840) 11 Ad. & E. 688, 699.

public make use of the way. It is, therefore, in my view, as it was in the view of Parke B., of the words when used in the Prescription Act, 1832, to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.

But what must be the nature of the interruption which the enjoyment of the way must be without? Is it sufficient, as I have said, to amount to an interruption if acts have from time to time been done which, while suffering the actual user to go on, yet challenged the right. Or must the interruption be some physical and actual interruption which prevents the enjoyment of the way?

With regard to this, I can find no help in the rest of the Act, but the words themselves are used in connection with what the Act calls " actual enjoyment " for a period of years. As it is actual enjoyment which must be without interruption, one would suppose that the interruption contemplated must be actual. One can scarcely interrupt acts except by some physical act which stops them. I therefore think that the word " interruption " in the expression in the Act " without interruption " is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment. In practice this construction of the words will lead to no difficulty and cause no surprise. Many bodies, such as the four Inns of Court, over and through whose property run roads used by the public, take the precaution to close and actually to stop the public enjoyment of those roads for one day at least in every year.

[His Lordship then passed to the consideration of the evidence and said that he was satisfied that there had been actual enjoyment of the way by the public for twenty, and, indeed, for forty years; that that enjoyment had been open and not by force or with permission; that for forty years it had been free from physical or actual interruption; that the evidence was consistent only with an intention by the plaintiffs to dedicate; and that the defendants, therefore, had established their case under s. 1 of the Rights of Way Act, 1932. He, accordingly, directed judgment to be entered for the defendants, with costs.]

Judgment for defendants.

Solicitors for the plaintiffs: *Westbury Preston & Stavridi, for Grece & Pringle, Redhill.*

Solicitors for the defendants: *Lees & Co., for E. C. King, Clerk to the Coulsdon and Purley U. D. C.*

G. F. L. B

LEVER BROTHERS, LIMITED *v.* KNEALE AND BAGNALL.

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April 6.

[1931. L. 2821.]

Appeal—Matter of " practice and procedure "—Injunction—Disobedience to order—Order of committal made by judge in Chambers—R. S. C. Order LIV., *r.* 23.

In an action for libel an order was made restraining the defendants from publishing the libels complained of or any similar libel injuriously affecting the plaintiffs. One of the defendants subsequently disobeyed that injunction, and the judge at Chambers made an order committing the defendant to prison for his contempt in disobeying the injunction:—

Held, that the order of committal was made in a matter of practice and procedure and that therefore under Order LIV., r. 23, of the Rules of the Supreme Court the appeal from such order was to the Court of Appeal and not to the Divisional Court.

APPEAL from an order of Finlay J. in Chambers.

In November, 1931, Lever Brothers, Ld., and certain directors and officials, brought an action against William M. Kneale and George Harvey Bagnall claiming damages for libel and an injunction restraining the defendants from further publishing the libels.

The action was tried before Branson J. and a special jury on November 7, 8 and 9, 1932, and on November 9, 1932, the learned judge on the findings of the jury entered judgment for the plaintiffs against both defendants for the sum of 20,000*l.* with costs, and further made an order " that the defendants their servants or agents and each and every of them be and they are hereby restrained from writing printing or causing to be written or printed circulating distributing or otherwise publishing the libels herein complained of or any similar libels or slanders injuriously affecting the plaintiff company in its business or otherwise or the other plaintiffs or any other director official or servant of the plaintiff company in their offices."

On March 5, 1937, an order was made by Finlay J. in Chambers committing the defendant George Harvey Bagnall to Brixton Prison for his contempt in disobeying the order

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made by Branson J. on November 9, 1932, restraining him by injunction from writing, printing, or causing to be written or printed, circulating, distributing or otherwise publishing the libels complained of or any similar libels injuriously affecting the plaintiff company. It was alleged that the said George Harvey Bagnall had disobeyed the order of Branson J. by writing and sending on February 22, 1937, to one Herbert George Rushton, a letter with enclosures defamatory of the plaintiffs, and by writing and sending on February 22, 1937, to the President of the Bribery and Secret Commissions Prevention League, a letter with enclosures defamatory of the plaintiffs.

The defendant, George Harvey Bagnall, appealed against the order committing him to prison for contempt.

The appellant in person.

Moelwyn Hughes for the respondents. There is a doubt, having regard to the authorities, whether an appeal from an order of a judge in Chambers committing a person to prison for contempt lies to the Court of Appeal or to the Divisional Court. It is provided by Order LIV., r. 23, of the Rules of the Supreme Court, that " In the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at Chambers shall be to a Divisional Court." Is an order to commit for contempt a matter of practice and procedure ? It is stated in the Yearly Practice for 1937, p. 829, that an appeal from an order for committal made by a judge at Chambers in the King's Bench Division is to a Divisional Court. It is stated in Oswald on Contempt, 3rd ed., p. 234, that appeals from an order of committal " made by a judge at Chambers do not appear to be appeals in ' matters of practice and procedure,' and therefore, in the King's Bench Division, must be made to a Divisional Court and not to the Court of Appeal." On the other hand, in Halsbury's Laws of England, 2nd ed., vol. 7, p. 54, it is stated that " the Court of Appeal has jurisdiction to hear and determine an appeal from an order of the High Court or a judge thereof . . . . for committal." It is stated in the Annual Practice for 1937, p. 1087, that " it is the practice to regard every order made by a judge in

Chambers in connection with a cause or matter in the High Court, as, prima facie, an order made in a matter of 'practice and procedure' and the appeals are entered in the C. A. list." In *Watson* v. *Petts* (1) it was held by the Court of Appeal that an application to a judge at Chambers for a prohibition to restrain an inferior Court from exceeding its jurisdiction is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and that an appeal lies to the Divisional Court and not, in the first instance, to the Court of Appeal. A. L. Smith L.J. said (2): "The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court." In the case of *In re Marchant* (3) a solicitor had given an independent undertaking, not in an action, to pay a sum of money and an order was made by a judge at Chambers upon an originating summons directing the solicitor to pay the sum of money to the plaintiff, and it was held by the Court of Appeal that an appeal against that order would not lie direct to the Court of Appeal, the matter not being one of practice and procedure within s. 1, sub-s. 4, of the Act of 1894. Vaughan Williams L.J. said (4) that "generally speaking, a matter of practice or procedure arises in the course of an action . . . . It is plain that the judgment on this originating summons is final, for it is a decision which puts an end to the whole question between the parties whichever way the decision may be; under those circumstances it is prima facie not a matter of practice or procedure." In order that a matter should be a matter of practice and procedure it must be something in the nature of interlocutory proceedings, and where the order made is a final order it is doubtful whether it is made in a matter of practice and procedure. In *Haxby* v. *Wood Advertising Agency, Ld.* (5) a writ was issued by a firm of solicitors, H. and C., purporting to act for the plaintiff. The plaintiff got this writ set aside and the action stayed on

(1) [1899] 1 Q. B. 54.
(2) Ibid. 55.
(3) [1908] 1 K. B. 998.
(4) [1908] 1 K. B. 1000.
(5) (1913) 109 L. T. 946.

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the ground that he had not authorized the issue of the writ, and the solicitors, H. and C. were ordered to pay the plaintiff's costs. An appeal against this order was dismissed with costs against H. and C. The costs not having been paid, the plaintiff applied for a writ of attachment against H., who alleged that he was not a partner with C. A judge at Chambers made an order that the plaintiff should be at liberty to issue a writ of attachment against H. on the ground that he being a solicitor had not complied with the orders for the payment of the costs by the firm. H. appealed against this order to the Divisional Court, and it was held on the authority of *In re Marchant* (1) that the appeal was not a matter of practice and procedure, and that it was rightly brought to the Divisional Court. The objection was taken in that case that the appeal ought to go to the Court of Appeal, but that objection was overruled.

[Greene L.J. The order there was made by the Court in its inherent jurisdiction over its own officers.]

It has been said more than once that the rule applies to a matter connected with a pending action. In the present case there was no pending action; the plaintiffs merely sought to enforce an order made in a previous action. Mr. Oswald cites the case of *Ex parte Sheriff of Lancaster. Ex parte Gosling* (2) in support of his statement that an appeal from an order of committal must be made to a Divisional Court and not to the Court of Appeal, but there is nothing in that case of any assistance on this point.

[Slesser L.J. referred to *Poyser* v. *Minors* (3) where Lush L.J. said that " 'Practice' in its larger sense . . . like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right."]

A matter ceases to be a pending matter as soon as a final order is made.

[Slesser L.J. The question in this case does not depend upon whether this order was an interlocutory or final order.

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(1) [1908] 1 K. B. 998.
(2) (1895) Times Newspaper, Feb. 11.
(3) (1881) 7 Q. B. D. 329.

It depends much more upon what is practice and procedure. Lush L.J. in *Poyser* v. *Minors* said (1) that "practice" and "procedure" were convertible terms and Baggallay L.J. agreed with that view.]

There are two cases against my contention. In *Yonge* v. *Toynbee* (2) solicitors had continued to defend an action after their client had become of unsound mind in ignorance of that fact. It was sought to make the solicitors personally liable for the costs, and it was held that an appeal from that order was on a matter of practice and procedure and therefore lay direct to the Court of Appeal and not to the Divisional Court. Buckley L.J. there said (3): "The expression 'practice and procedure' is not confined to steps in the action itself, but covers also matters in connection with the action." In *Simbro Trading Co.* v. *Posograph* (*Parent*) *Corporation, Ld.* (4) it was held by the Court of Appeal that an appeal from a judge at Chambers refusing leave to revoke a submission to arbitration is in a matter of practice and procedure and therefore lies to the Court of Appeal and not to a Divisional Court. Scrutton L.J. appears to have held in that case that an appeal from an order of a judge at Chambers upon an application to enforce an award of an arbitrator was an appeal in a matter of practice and procedure. The action in which the injunction was made ceased to be a pending action as soon as the final order was made at the trial, and the subsequent application for committal was a new proceeding arising out of the defendant's contempt in disobeying the injunction.

SLESSER L.J. This is an appeal by Mr. Bagnall from an order of Finlay J., dated March 5, 1937, ordering his committal because of his disobedience of an order of Branson J. made on November 9, 1932, in an action for libel by Lever Brothers and others, in which they claimed an injunction to restrain Mr. Bagnall and another and their servants or agents from writing, printing and circulating, distributing or otherwise publishing the libels complained of. It being said that that

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(1) 7 Q. B. D. 334.
(2) [1910] 1 K. B. 215.
(3) [1910] 1 K. B. 220.
(4) [1929] 2 K. B. 266.

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order had been disobeyed, an order for committal was made by Finlay J. On that, Mr. Bagnall appeals to this Court, and a preliminary objection is taken by the respondents that, under the provisions of Order LIV., r. 23, this Court has no jurisdiction to hear the appeal. That rule, dealing with appeals from Masters and proceedings in Chambers, is in the following terms: "In the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court." It is said that this is not such a matter of practice and procedure and, therefore, the appeal ought to lie to the Divisional Court and not to this Court. In my opinion, however, that contention is ill-founded. I think that this case is one of practice or procedure.

It is to be observed that the problem which has arisen in certain cases to which our attention has been called, namely, the problem whether the matter arises out of a different cause than that which was originally instituted, does not strictly arise: for example, in *Haxby* v. *Wood Advertising Agency* (1), where the obligation had been imposed upon a firm of solicitors to pay certain costs and an order was made by the judge at Chambers that the plaintiff should be at liberty to issue a writ of attachment against H., being a solicitor, on the ground that he had not complied with the order for the payment of costs, it was held that an appeal was not in a matter of practice or procedure. The reason was that the proceeding against the solicitor in that case did not strictly arise as a matter of practice or procedure out of the original proceedings, but was an obligation imposed upon the solicitor to pay costs, enforced by the inherent jurisdiction of the Court itself. The same observation may be made of several other cases, which it is not necessary here to discuss, because in the present case it is clear beyond question that the injunction which was here granted was the subject of relief which was sought by the plaintiffs in the action, and it was a disobedience of that injunction ordered in that action which, it is said, led to this order for committal.

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(1) 109 L. T. 946.

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In the circumstances, the only matter that remains is this. After an order for an injunction has been made and there is a disobedience of it followed by a committal, is that order for committal a part of the practice or procedure? In my opinion, it clearly is.

I think the matter is stated sufficiently in the case of *Poyser* v. *Minors* (1), where Lush L.J., with the approval of Baggallay L.J., speaking of the word "practice" which occurs in s. 32 of the County Courts Act, 1856, which authorizes county court judges, with the approval of the Lord Chancellor, to frame rules and orders for regulating the practice of the courts and forms of proceedings therein, says (2): "'Practice' in its larger sense—the sense in which it was obviously used in that Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product. 'Practice', and 'procedure', as applied to this subject, I take to be convertible terms."

The language of the section, which I read, in the Act of 1856, is not exactly the same as that of the order we have here to consider, but I think the definition of "practice" which is there stated is one which properly can be applied here, and I ask myself, therefore, whether, within the meaning of these observations of Lush L.J., this order for committal is not a mode of proceeding by which a legal right is enforced. It appears to me clearly that it is so.

It was argued by Mr. Hughes that in so far as an order for injunction has once been made, therefore the Court is, so to speak, functus officio, and whatever is done thereafter is not a practice or proceeding in the same subject-matter as that in which the injunction was. That, I think, is erroneous. The Court retains jurisdiction to deal with its orders by way of prohibition, such as injunction, or by way of ordering some specific thing to be done, as in the case of an order for specific performance, and by consent of the parties, or for sufficient

(1) 7 Q. B. D. 329.

(2) Ibid. 333.

reason, the Court has always jurisdiction to deal with those orders which otherwise limit the liberty of a person to do what he will, or which order him to do that which he otherwise might not do. I think the Court retains seisin of the whole matter, and it being a matter of practice or procedure, it falls directly within Order XXIII., and, therefore, it being a matter of practice or procedure, an appeal lies to this Court and must therefore be considered.

GREENE L.J. I agree that this preliminary objection fails. As the matter is of some importance, I will add my own reasons in one or two words.

The granting of injunctions came, of course, from the Courts of Equity and the remedies which the Courts of Equity gave were specific remedies which were enforced in personam. That was the essence of the equitable remedy by injunction, whether mandatory or prohibitory. When a Court of Equity made an order prohibiting the defendant from doing an act, or ordering him to do an act, it was not functus in the action. It existed to give not merely a paper remedy, but an effective remedy, and it was there to see that its order was obeyed. If the successful plaintiff found that the order of the Court was disobeyed, he came back to the Court to get that supplementary relief which would make the order effective, and he did that by applying for whatever remedy was appropriate, committal in the case of an injunction and attachment in the case of an affirmative order to do an act. In either case the Court was merely enforcing the order it had given by the procedure of committal or attachment, that is to say, execution in personam peculiar to the Court of Equity.

Mr. Hughes contended that the action was, so to speak, dead as soon as the order was made at the trial, and that the subsequent application for committal or for leave to issue a writ of attachment, as the case might be, was something in the nature of a new proceeding springing up in the light of the contempt. I am unable to regard the matter in that light. It appears to me that the judgment, so long as it is not complied with, is still open and the action is still pending, in the sense that the successful plaintiff can come back to the Court and obtain the particular remedy which, by the procedure of the Court of Equity, is appropriate to the case. It is perfectly clear, I think, when one considers the case of an affirmative order, because in that case, if there is no time specified in the order for the doing of the act, the plaintiff must come back to the Court—at any rate it is the practice in the Chancery Division—and obtain a supplementary order, called a four-day order, limiting the time within which the act has to be done. Nobody could say that that was not a matter of practice and procedure, yet it is an order which is made after the trial of the action and after the rights of the parties have been determined upon that trial. An order having been made to do the act, and it not having been complied with, a four-day order is next asked for. If the four-day order is disregarded by the defendant, the next step is to come to the Court and to ask for leave to issue a writ of attachment. I am unable to see how it can be said that either of those two steps is anything but a matter of procedure for enforcing, by the appropriate means, the particular equitable remedy given.

Preliminary objection overruled.

The Court then proceeded to hear the appeal, which was dismissed.

Solicitors for the respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

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THE KING *v.* MANCHESTER JUSTICES.

Ex parte LEVER.

Justices—Conviction—Proof of offence—Fine—No record in register—Whether conviction complete—Autrefois convict—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 22, *sub-ss.* 1, 4.

On January 20, 1937, two summonses came before justices sitting in petty sessions charging the applicant with certain motor car offences. When the summonses were called on the applicant was not present. The service of the summonses was proved, evidence was given by the police and the justices fined the applicant. Before the decision of the justices had been entered in the register of convictions and orders of the Court kept under s. 22, sub-s. 1, of the Summary Jurisdiction Act, 1879, the justices, while they were still sitting, were informed of certain previous convictions of the applicant in respect of motoring offences and that there had been delay on his part in paying the fines imposed for those offences. In view of that information the justices formed the opinion that the matters raised by the summonses ought to be dealt with in the presence of the applicant and they issued a warrant for his arrest. The applicant, accordingly, appeared before a differently constituted bench of justices on January 23, when he pleaded guilty to the two summonses and was ordered to pay fines larger than those imposed on January 20:—

Held, that the decision of the justices on January 20 constituted a complete and effective conviction of the applicant, although it had not been entered in the register, and, therefore, on January 23 the applicant was entitled to plead autrefois convict of the offences with which he was then charged.

RULE NISI for certiorari.

On January 20, 1937, two summonses came before justices sitting at Manchester police court charging the applicant with offences under the Road Transport Lighting Act, 1927, and a Local Act in that on December 17, 1936, he had left a motor-car without lights and unattended in a street in Manchester.

When the summonses were called on the applicant was not present. The service of the summonses was proved, evidence was given by the police, and the justices fined the applicant 20*s*. on one summons and 10*s*. on the other.

The clerk to the justices wrote on each summons the amount of the appropriate fine and the summonses were taken by the police officer in charge of the case to the office in the Court where convictions made by the justices were recorded in the register of convictions and orders of the Court kept under s. 22, sub-s. 1, of the Summary Jurisdiction Act, 1879. (1)

Before any entry had been made in the register a clerk in the office remembered that there were already four fines against the applicant for motoring offences which had not been paid and also that on three previous occasions there had been delay on his part in paying fines for such offences. The clerk to the justices was immediately informed of these matters and he passed the information to the justices who were still sitting.

In view of that information the justices thought that the matters raised by the summonses should be dealt with in the presence of the applicant, and they issued a warrant for his arrest. The applicant appeared before a differently constituted bench of justices on January 23. He pleaded guilty to the two summonses and was fined 40*s.* in respect of each summons.

The applicant thereupon obtained this rule to remove into the Court to be quashed the two convictions of January 23 on the ground that, in view of what had happened on January 20, on January 23 he was entitled to plead autrefois convict of the two offences with which he was then charged.

Gorman K.C. and *V. R. M. Gattie* showing cause against the rule. On January 23, 1937, the applicant was not entitled to plead autrefois convict, because the decision of the justices on January 20, not having been registered under s. 22 of the Summary Jurisdiction Act, 1879, did not amount to a complete conviction on which such a plea could be founded. A mere

(1) By s. 22, sub-s. 1, of the Summary Jurisdiction Act, 1879: "The clerk of every court of summary jurisdiction shall keep a register of the minutes or memorandums of all the convictions and orders of such court . . . ." By sub-s. 4: "The entries relating to each minute memorandum or proceeding shall be either entered or signed by the justice or one of the justices constituting the court by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had . . . ."

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verbal decision by justices does not amount to a conviction and does not take it out of the power of the justices further to consider the case and, if they think fit, to vary the penalty which they have imposed. To become effective as a conviction a decision of justices must have been formally entered in the register: *Jones* v. *Williams.* (1) *Rex* v. *Sheridan* (2) and *Rex* v. *Grant* (3) are distinguishable. In neither of them was the question raised whether the original decision of the justices had been entered on the register.

Montgomery K.C. and *Wingate-Saul* were not called on to argue in support of the rule.

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to remove into this Court two convictions under the hand of certain justices of the city of Manchester bearing date January 23, 1937, whereby the applicant was convicted of two offences, one under the Road Transport Lighting Act, 1927, and the other under a local Act for the good government of the city of Manchester. The ground for the rule was that on January 23 the applicant was entitled to plead autrefois convict of the two offences in question.

Mr. Gorman has admitted that there is a good deal of authority against him, but he seeks to rely on the decision, now sixty years old, in *Jones* v. *Williams.* (1) That case, I take it, was cited in support of the proposition that a distinction is to be drawn between a potential or incomplete conviction and an actual or complete conviction. *Jones* v. *Williams* (1) decided very little and nothing which is of assistance in the present case. The point of substance there was that before a conviction was drawn up one of the justices who had dealt with the matter changed his mind and Grove J. said: " That would be a good reason for his refusing to draw up the conviction, there being a locus pœnitentiæ, the conviction not having been formally drawn up and signed." Lindley J. said: " Two magistrates were in favour of reversing the conviction previously pronounced, but one of them only had heard the evidence in" the "case, and the third magistrate who had heard the evidence was for upholding the conviction. No doubt that was irregular, but no conviction had been drawn up, and the proceedings may be said not to have come to an end. The action of the justices was not perhaps an acquittal, but it did not amount to a conviction. I think it may be treated as a part heard case."

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(1) (1877) 41 J. P. 614.

(2) [1937] 1 K. B. 223.

(3) (1936) 100 J. P. 324.

The question raised in that case was whether the two justices were justified in reversing the first judgment. That seems to be quite a different point from the present one. Here it is not suggested that there was any change of mind on the part of the justices. All that happened was that the justices were prepared to deal with the matter in the absence of the applicant until it was brought to their knowledge that he had certain previous convictions recorded against him. Then they decided to reopen the whole case with the result that the applicant was brought before a differently constituted Court which imposed higher penalties on him.

After the justices, on January 20, had ordered the applicant to pay certain fines, all that remained to be done in connection with their decision was for it formally to be entered in the register of convictions. It has been argued that until that entry was made there was no conviction properly so-called. Reference has been made to s. 22 of the Summary Jurisdiction Act, 1879. Sub-s. 1 of the section provides that: "The clerk of every court of summary jurisdiction shall keep a register of the minutes or memorandums of all the convictions and orders of such court . . . ." Sub-s. 4 provides: "The entries relating to each minute memorandum or proceeding shall be either entered or signed by the justice or one of the justices constituting the court by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had . . . ." In other words, the making of the conviction is antecedent to the entry of it in the register. It is not the entry in the register which makes, or contributes to the making of, the conviction. That has already been made. All that remained to be done

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on January 20 was to perform a formal act. The conviction itself was complete.

This matter is really concluded by *Rex* v. *Sheridan* (1), where the Court of Criminal Appeal rejected the argument that there could not be a conviction without a sentence, and *Rex* v. *Grant* (2), where it was held that a plea of guilty was a conviction on the prisoner's own confession sufficient to found a plea of autrefois convict. Reference was made in *Rex* v. *Sheridan* (1) to *Reg.* v. *Blaby* (3), where the question for decision was what meaning was to be given to the word "conviction" in ss. 9 and 12 of the Coinage Offences Act, 1861, which provided that certain consequences should ensue on a conviction under s. 9 of the Act. The case came before the Court for Crown Cases Reserved and it was held that the expression "conviction" in those sections must be taken to include the case of a person who had been found guilty of an offence but had been released on finding a recognizance to come up for judgment when called on, and that it did not necessarily involve a sentence or judgment by the Court. Hawkins J., delivering the judgment of the Court of five judges, said: "We have no difficulty in holding that this conviction should be affirmed, and on this simple ground: that upon carefully considering the language of ss. 9 and 12 of the Coinage Offences Act, 1861, there can be no doubt of the meaning of the word 'convicted' as there used; it appears plain that it is not necessary that there should be a judgment before there can be a conviction. Taking s. 9, it is evident that such 'conviction' means the finding of the jury that the person charged is guilty, ... 'convicted' meant 'found guilty,' and the sentence was to follow on the conviction. And a plea of guilty would equally be a conviction."

In these circumstances I cannot think that Mr. Gorman's argument has any real weight. The mere fact that when the justices ordered a warrant to be issued on January 20 the decision which they had previously come to had not been entered in the register does not seem to me to detract from

(1) [1937] 1 K. B. 223.
(2) 100 J. P. 324.
(3) [1894] 2 Q. B. 170.

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the completeness of that decision as a conviction. On January 23 the applicant was entitled successfully to plead autrefois convict and this rule should be made absolute.

HUMPHREYS J. I am of the same opinion. The rule which is the basis of the plea of autrefois convict is stated by Charles J. in *Reg.* v. *Miles* (1) in these words: "The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation." On the facts of this case it appears to me to be plain that the applicant was placed in peril of legal penalties more than once on the same accusation. I find it difficult to treat seriously the argument that a statement by justices, who are a court of competent jurisdiction, that a person who has been tried before them is guilty of the offence charged against him does not constitute a conviction until a clerk has made a record of the finding of the magistrates in a register which the court is required to keep. I also think that the matter is concluded by authority.

SINGLETON J. In my opinion the matter argued before the Court is covered by *Rex v. Sheridan.* (2)

Rule absolute.

Solicitors showing cause: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors in support: *Wontner & Sons, for L. M. Lever & Co., Manchester.*

(1) (1890) 24 Q. B. D. 423, 438.

(2) [1937] 1 K. B. 223.

G. F. L. B.

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March 16, 17,
18, 23.

MEDCALF AND ANOTHER *v.* R. STRAWBRIDGE, LIMITED.

Nuisance—Private road—Damage to surface—Horse-drawn vehicle—Use of skid pan on wheel—Effect on value of adjoining property—Special interest of frontagers—Right to sue for an injunction without joining Attorney-General.

Frontagers on a road not repairable by the inhabitants at large, have such an interest, over and beyond that of the general public, in preventing damage to the road, as to entitle them to sue for an injunction against any one causing unnecessary damage to the road, and the Attorney-General need not be a party to the action.

ACTION tried by Atkinson J. without a jury.

The plaintiffs were two frontagers, living in Cedar Avenue, East Barnet. Under an indenture of conveyance dated October 4, 1911, Mr. Edward Horace Thompson acquired a building estate in East Barnet. The conveyance imposed certain obligations on him with regard to making and maintaining roads. Mr. Thompson sold a number of plots to different purchasers and, on October 4, 1920, there was entered into between him and his various purchasers what was called a deed of mutual covenant whereby each purchaser agreed to perform such of the stipulations contained in the schedule thereto as were applicable to the plot purchased. One of the stipulations in the schedule was to pay to the vendor a reasonable proportion of the cost of maintaining all roads appertaining to the land sold in common with the adjoining land.

The plaintiff Medcalf owned a house in Cedar Avenue, which he had acquired from Thompson, the owner of the building estate, on April 11, 1924. This property was transferred to the plaintiff subject to the restrictive conditions appearing on the registered title and also to the conditions and stipulations contained in the deed of October 4, 1920. The plaintiff, Mrs. Kemp, also owned a house in Cedar Avenue, which she had purchased from Lily Freestone on August 25, 1927. Her Land Certificate stated that the land held by her was subject to a restrictive covenant contained in the conveyance of October 4, 1911, so far as it ran with the land, and to the purchaser's covenants in a transfer dated February 11, 1920, from Mr. Thompson to a Mr. Eyres, the relevant covenant being in the same terms as the one (referred to above) relating to the cost of the maintenance of roads in the indenture of October 4, 1920.

In October, 1927, Medcalf was called upon by Thompson to pay 2*l.* 5*s.*, his proportion of the cost of road repairs. He paid it. In 1933 further repairs to the road were carried out, apparently by arrangement between the frontagers. This time Medcalf paid 1*l.* and Mrs. Kemp also made the same contribution. The road was not well made. It consisted of 6 inches of hardcore, and on the top of that 6 inches of stone gravel. The paths were not kerbed.

Cedar Avenue fell rather steeply from one end. The average fall was stated to be 1 in 12 to a point called Lovelace Road where the road became level. Every day a four-wheeled van belonging to the defendants was driven by their servant down Cedar Avenue. They had a customer near the top of the Avenue and one or two just above Lovelace Road. In August, 1936, the defendants' servant began to drive the van down the hill with a skid pan on the near rear wheel. The effect was to cut a series of ruts or furrows in the Avenue two or three inches deep as far as Lovelace Road. Mrs. Kemp saw the van being driven in this way in August, 1936, and told her husband, who saw it for himself on August 8, 1936. On August 10, Mr. Kemp wrote to the defendants complaining of the van being driven down the road and doing very serious damage, tearing up the surface and leaving a furrow all down the road, gravel and loose stones being torn from the surface. The letter called on the defendants to undertake that they would cease to do the damage. To that letter there was a formal acknowledgment on August 11, saying that the letter was receiving attention. The damage continued and on August 17 Mr. Kemp wrote again pointing out how materially the road was being damaged. The result of that was that the defendants' servant ceased to use the skid pan. But in

November the defendants' servant began to use the skid pan again, and on November 16 Mr. Kemp again wrote to the defendants about it. That was followed by a telephone conversation, in the course of which Mr. Kemp asked the defendants for an undertaking that the use of the skid pan would stop. It did stop for a day or two, but later the skid pan was used again. Cedar Avenue was a private road, and although a resolution was passed by the Local Authority on July 23, 1936, relating to taking it over, the necessary proceedings had not been completed and at the time of the action it remained a private road.

On November 30, 1936, Mr. Medcalf and Mrs. Kemp issued a writ claiming an injunction to restrain the defendants from causing unnecessary damage to the surface of Cedar Avenue. The main defence to the plaintiffs' claim was that no injunction would lie at the suit of the plaintiffs. It was said that if what was being done did amount to a nuisance, it was a public nuisance, and the damage being common to all the subjects of the Crown, the Attorney-General alone could sue.

The plaintiffs claimed to have a special interest other than and beyond the general inconvenience and injury suffered by the public on three grounds, (1.) that they were under a contractual obligation to repair, (2.) that under s. 6 of the Private Street Works Act, 1892, if the local authority decided to make the road and take it over, it would be done at the expense of the adjoining owners, and that the existing condition of the road was a material matter for the Authority to consider before exercising their powers, and, therefore, that they, the plaintiffs, had a special interest in maintaining the road in a satisfactory condition and so postponing the making and taking over, and (3.) that the value of the plaintiffs' premises might be and would be affected by the condition of the road.

R. Fortune for the plaintiffs. The evidence shows that the defendants' driver by using the skid pan was causing unnecessary damage to the road. The two plaintiffs, who own and occupy houses on the road, have an interest in preventing damage being done to the road and are entitled to maintain this action.

Roland Burrows K.C. and *H. Hillaby* for the defendants. An injunction will not be granted at the suit of the plaintiffs. If the use of the skid pan by the defendants' driver amounts to a nuisance, it is a public nuisance and the Attorney-General alone can sue. The plaintiffs must satisfy the Court that they have sustained or will sustain some particular damage beyond the injury suffered by the public at large. *Vanderpant* v. *Mayfair Hotel Co., Ld.* (1) The plaintiffs here have not shown that they have suffered any particular injury or damage, nor that they have been put to any expense in consequence of this use of the skid pan by the defendants' driver. In *Stockwell* v. *Southgate Corporation* (2), Porter J. had to consider whether the plaintiffs there, who were two frontagers, had a right to bring an action for a declaration that a highway was repairable by the inhabitants at large, and not by the frontagers. Porter J. said that the principle that when the party who made the claim was not peculiarly affected the Attorney-General must be made a party to the action, was well known and required no authority. On the facts of that case the judge decided that the plaintiffs were peculiarly affected and that the Attorney-General need not be a party to the action. In *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* (*No.* 2), *Ld.* (3), Lawrence J. said: "In all cases of apprehended nuisance the authorities show that if the plaintiff proves that he will certainly sustain substantial damage by what the defendant is about to do the Court will restrain the defendant from doing the act and will not wait until the plaintiff has sustained the damage." In this case there is no apprehension of special damage to the plaintiffs. Can it be said here that the damage is likely to be substantial or sufficiently substantial to justify the Court in interfering in favour of the plaintiffs? It is submitted that the action cannot be maintained.

R. Fortune in reply. The plaintiffs have a special interest in this matter, other than and beyond that of the general public, on three grounds. In the first place, they are owners

(1) [1930] 1 Ch. 138.

(2) (1936) 155 L. T. 437.

(3) [1919] 1 Ch. 407, 412.

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of houses adjoining the private road in question, and are under a contractual obligation to repair the road. Secondly, if the road gets into a state of disrepair, that may hasten the time when the local authority may decide, under s. 6 of the Private Street Works Act, 1892, to make the road and take it over, the condition of the road being a material matter for the local authority to consider. If the road is so made and taken over by the local authority, the plaintiffs, as owners of adjoining property will have to bear a proportion of the expense of making up the road. Thirdly, the value of the plaintiffs' property may be affected by the condition of the road. In *Stockwell* v. *Southgate Corporation* (1) Porter J. said: "What would happen supposing they endeavoured to sell the land? The answer would be that if this is not a highway repairable by the inhabitants at large, but comes under the Private Street Works Act and the obligation imposed by it, the frontagers would get much less in price for their property than they would have got had the road been a highway repairable by the inhabitants at large. It is quite true that a man cannot recover merely for damage to himself in a case where the claim is a matter which affects the public at large as well as himself, but this is not a case where the frontager is affected in his person: it is a case where the land which he holds is affected. That may be seen by the fact that if he disposes of the land it is the purchaser who is affected." Thus, the owners of houses on a private road have a special interest in preventing damage to the road because of the possible effect on the value and enjoyment of their houses. The plaintiffs in this case are entitled to sue for an injunction to restrain the defendants from doing unnecessary damage to the road, and the Attorney-General need not be a party to the action.

ATKINSON J. referred to the facts stated above, and found on the evidence that the use of the skid pan by the defendants' driver was quite unnecessary. He continued: Since the writ was issued, this use has been discontinued and

(1) 155 L. T. 437, 441.

there is no question of there being any trouble whatever.

The other relevant facts are these. On July 23, 1936, the local authority passed a resolution relating to the taking over of this private road. On October 19 they approved a provisional specification and apportionment of the expense for making the road and on November 7 resolutions were advertised and notices served on the owners. Various objections have been lodged to the apportionment and some of these have been arranged in a friendly way and some have not. These can only be dealt with by proceedings before the magistrates. Such proceedings have not yet taken place. There is no obligation on the local authority to take over and make the road. They have not committed themselves to it and they can change their minds at any time. I am told that the taking over of the road has been a matter of discussion for many years and the plaintiffs think it may very well be quite a long time before anything is really done.

The main defence is, that no injunction will lie at the suit of the plaintiffs. It is said that if what is being done does amount to a nuisance it is a public nuisance and the damage being common to all the subjects of the Crown the Attorney-General alone can sue. There is no doubt that, to entitle a person to maintain an action to restrain a public nuisance he must show that he has sustained or will sustain some particular damage other than and beyond the general inconvenience and injury suffered by the public. That is how it was put in *Vanderpant* v. *Mayfair Hotel Co., Ld.* (1)

The two plaintiffs, in reply to this argument, claim to have a special interest on three grounds. First, they say that they are under a contractual obligation to repair. Secondly, that under s. 6 of the Private Street Works Act, 1892, if the local authority decide to make the road and take it over it will be done at the expense of the adjoining owners and that the existing condition of a road is a material matter for the authority to consider before exercising their powers and, therefore, that they, the plaintiffs, have a special interest in

(1) [1930] 1 Ch. 138, 153.

maintaining the road in a satisfactory condition and so postponing the making and taking over. The relevant wording of s. 6 is : " Where any street . . . . is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may . . . . resolve," and so on, so that it is clear that the existing condition of a road is a matter which is material for the council to consider. If it gets into a state of disrepair it may lead to the council making the road in an expensive way so far as the frontagers are concerned, and making it at their expense. The third ground on which a special interest is claimed is that the value of their premises would be affected by the condition of the road.

With regard to the first ground, I think that Mrs. Kemp's claim breaks down. She did not take directly from Mr. Thompson and the covenants relating to the maintenance of the road could only bind her if they ran with the land. I am satisfied that none of the covenants relating to the road do run with the land and, therefore, I cannot see that she is under a contractual liability to repair.

Mr. Medcalf's position is different. He bought directly from Mr. Thompson who apparently is the owner of the roads. I can see no reason to suppose that the frontagers own any part of the road, but there is a direct purchase from Mr. Thompson. The land was transferred to Mr. Medcalf subject to the restrictive conditions appearing on the registered title and subject also to and with the benefit of the conditions and stipulations contained in the deed of mutual covenant. One of the conditions and stipulations in the deed of mutual covenant was a covenant to keep this road in repair. The covenant was to pay to the vendor, that was Mr. Thompson, his heirs or assigns on demand a reasonable share or proportion towards the cost and expense of maintaining and repairing all roads, etc., appertaining to the said road adjoining to the said land until the same shall be taken over. It was said on the other side that this was not a covenant on Mr. Medcalf's part. But it seems to me that, if land is conveyed to a purchaser subject to the conditions and stipulations of another deed, and in that other deed there is a covenant to pay a proper share of the cost of making the road, there is a contractual obligation to bear some share of the cost of maintaining the road.

On the second ground, in my judgment, the possible liability under s. 6 of the Private Street Works Act, 1892, does place the two plaintiffs in a position differing from that of the general public and does enable them to say successfully that they were in November, 1936, threatened with a special injury. Expense had been incurred in 1927 and again in 1933 in maintaining the road in a satisfactory condition and I am quite satisfied that if this injury had gone on, the frontagers would very soon have been faced with the necessity of expenditure of money to maintain the road in a satisfactory condition.

The retort to that was this. It was said: Oh yes, that would be all very well if the council were not going to take over the road, but there are the resolutions and, therefore, this is merely a threatened expense which will never materialise. I am not satisfied about that. I repeat that the council are not bound to go on, they are still talking and there are objections which have not yet been dealt with, and I cannot think that, if the plaintiffs would have had a right of action if no resolution had been passed, the passing of the resolution deprives them of that right. At any rate, I think that on that ground they have an interest differing from that of other members of the public.

With regard to the third ground, again I agree with Mr. Fortune that the owners of houses or premises on a private road have a special interest in preventing damage to the road because of the possible effect on the enjoyment and value of the houses. One can test it by an extreme case. Supposing a user which so destroyed the surface of a road as to make it quite unfit for motor-cars to use it without serious risk to the springs—such a road which anybody, who possibly could, would avoid using—can it really be said that the owners of the houses adjoining that road do not suffer an injury differing from that of the other members of the public? If anybody coming to make an offer for those houses saw a road which was in such a wretched condition that it could not be comfortably or safely used, it seems to me that it would be idle to say that the value of the premises was not being substantially affected by the condition of the road.

The point whether injury of that sort placed a member of the public in a special position was considered by Porter J. in *Stockwell* v. *Southgate Corporation.* (1) The judge was there considering whether the plaintiff had a right of action. Apparently there was some doubt whether a certain highroad was still a private road or was repairable by the public at large, and the plaintiff brought an action for a declaration. Mr. Burrows, who was in the case, took the point that the action would only lie at the suit of the Attorney-General. Porter J., referring to Mr. Burrows, said (2): "He said this is an action for a declaration which arose with regard to a highway repairable by the inhabitants at large. That is a matter, put in that form, by which all the inhabitants of the realm would be affected, because the question whether it is to be a highway or not is one which affects the whole country, and, when that remedy is asked for, the Attorney-General ought to be a party to the action. In a matter where the whole of the country is affected and the particular party who makes the claim is not peculiarly affected, the principle that when that exists the Attorney-General must be made a party is well known and requires no authority; but one has to ask oneself: Are these particular people peculiarly affected or are they not? In my view, they are peculiarly affected. I think the question does not depend upon the exact question whether their property is invaded in any way; I think it depends upon the much broader question: Are they peculiarly affected? One way of asking oneself that question is: What would happen supposing they endeavoured to sell the land? The answer would be that if this is not a highway repairable by the inhabitants at large, but comes under the Private Street Works Act and the obligation imposed by it, the frontagers would get much less in price for their property

(1) 155 L. T. 437. (2) Ibid. 441.

than they would have got had the road been a highway repairable by the inhabitants at large. It is quite true that a man cannot recover merely for damage to himself in a case where the claim is a matter which affects the public at large, as well as himself, but this is not a case where the frontager is affected in his person; it is a case where the land which he holds is affected. That may be seen by the fact that if he disposes of the land it is the purchaser who is affected. It is only in the right of his land and not in right of himself. For these reasons I hold that the Attorney-General need not be a party to this action."

It is said that that was only obiter, but I should pay the very greatest respect to it if it were only obiter, and forming my own opinion about it I think that it must be right. Here the condition of the road would affect the value of the land in two ways. If there were no idea of the council's taking it over, the worse the road got surely the lower the value of the premises on it would become. And always hanging over the owners would be the fear that if the road got bad enough the council would eventually take it over and make it at the owners' expense. Those fears must affect the value of the land to some extent and, therefore, they put the existing owners in a position differing from that of other members of the public.

The position is this. I am satisfied that the plaintiffs have established their right to sue. I am satisfied that if the defendants' driver were permitted to continue the use of the skid pan indefinitely the damage caused to the road would very soon necessitate the expenditure of money in making good the road and in maintaining it in a condition satisfactory from the point of view of a local authority. It would also tend to hasten the day when the road would be taken over.

It is said that a quia timet action can only be brought where there is an apprehension of special damage. In *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* (*No.* 2), *Ld.* (1), the principle was put by Lawrence J.: "In all cases of

(1) [1919] 1 Ch. 407, 412.

apprehended nuisance the authorities show that if the plaintiff proves that he will certainly sustain substantial damage by what the defendant is about to do the Court will restrain the defendant from doing the act and will not wait until the plaintiff has sustained the damage." I am quite certain here that this act is an illegal act, illegal in the sense that the man was inflicting in a wholly unnecessary way damage to this road. It is not a case of "may" inflict damage. I am quite satisfied that the result would be a certainty. Mr. Roland Burrows emphasized the word "substantial," and said: Can you say this is substantial or sufficiently substantial to justify the interference of the Court? I think that it is. Certainly if one looks at it from the point of view of the frontagers as a whole there can be no question about it. If one confines oneself to the damage suffered by the two plaintiffs it is substantial within the meaning of that principle. The extent to which it would affect the value of their land is unknown, but it would be progressive. Cutting the road up into ruts in the way described must lead to expenditure which nobody could call trivial and must tend to hasten the day, unless expense is incurred, when the road is taken over. It would be an amazing thing if the Court could not interfere at the instance of people prejudiced in this way to protect a road used by them and in which they live from injury of this kind. Therefore, I think that the damage which they would suffer is sufficiently substantial to impose an obligation on the Court to interfere. The form of the injunction which I propose to make is this. It will be an injunction to restrain the defendants, their servants and agents, until the taking over of Cedar Avenue, East Barnet, from locking the wheel of any horse-drawn van with a skid pan when descending Cedar Avenue so as to injure the said road.

Judgment for plaintiffs.

Solicitor for the plaintiffs: *H. H. Kemp.*

Solicitors for the defendants: *Billinghurst, Wood, and Pope.*

T. W. M.

BOAG *v.* STANDARD MARINE INSURANCE COMPANY, LIMITED.

C. A.

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Feb. 11, 12.

Insurance (Marine)—Insurance of cargo for full value at date of policy—Increase of value of cargo—Increased value policy effected without knowledge of original insurers—Total loss—Both policies paid in full—Letters of subrogation to both insurers—Salvage—Claim by increased value underwriters to contribution—Original insurers held entitled to whole amount—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79, *sub-s.* 1.

By s. 79, sub-s. 1, of the Marine Insurance Act, 1906: "Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

The owners of a cargo of wheat insured it with the S. M. I. Co. for 685*l.*, which was then its full value. During the voyage the price of the wheat rose substantially, and the owners, without the knowledge of the S. M. I. Co., effected an increased value policy with underwriters for 215*l.* The cargo subsequently became a total loss, its net sound value being 900*l.* Both the company and the underwriters paid the amounts of their respective policies in full, and received letters of subrogation from the cargo owners. Subsequently, as the result of general average adjustments, the owners received a sum of 532*l.* 4*s.* 8*d.* as salvage. The S. M. I. Co. claimed the whole of this sum; the underwriters claimed to be entitled to contribution in the proportion which their policy bore to the total value. On an interpleader to determine the respective rights of the company and the underwriters, Branson J. held that the underwriters were not entitled to contribution, but that the company were entitled to receive the whole of the salvage. On appeal:—

Held, that the words "he [the insurer] is thereby subrogated to all the rights and remedies of the assured in and in respect to that subject-matter as from the time of the casualty causing the loss," in s. 79, sub-s. 1, merely gave effect to the well-recognized law with regard to subrogation, the result of which was that it was an integral part of the primary policy that the S. M. I. Co. had a contingent right of subrogation which vested in them at the moment when the policy was effected; that the contingency had occurred and that the contingent right had become a vested right.

Held, therefore, that the company was entitled to the whole of the salvage.

Decision of Branson J. [1936] 2 K. B. 121 affirmed.

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APPEAL from a decision of Branson J. on an interpleader issue tried by him in the Commercial List. (1)

The issue came before the Court on the following agreed statement of facts:—

The Pentiron Steamship Company, Ld., the shipowners, were at all material times the owners of the steamship *Penthames*. Messrs. Bodey, Jerrim & Denning, Ld. (hereinafter called "the cargo owners"), were at all material times the owners of a consignment of Italian wheaten sharps consisting of 1000 bags weighing 50 tons and 1325 bags weighing 99 tons, 2 cwt., 1 qr., 4 lbs., having purchased them from Messrs. Matthews & Ventura, Ld. The consignment formed part of the general cargo of the *Penthames* from Mediterranean ports to the United Kingdom and was shipped at Naples on September 17, 1934, for delivery at Bristol. The c.i.f. invoice value of the consignment was 635*l.* 18*s.* 1*d.*, but owing to an appreciable advance in market price the gross value at the intended port of discharge was 1043*l.* 16*s.*, and after deduction of duty, landing charges, dues, discount and brokerage it had a nett value of 899*l.* 14*s.* 8*d.*

The cargo owners had taken over the policies on their consignment which had been effected by Matthews & Ventura, Ld., with the claimants, Standard Marine Insurance Company, Ld. (hereinafter called "the company"), on a total valuation of 685*l.*, and the cargo policies were dated September 19, 1934.

The cargo owners also insured the consignment with certain underwriters at Lloyds, of whom the plaintiff, Boag, was a representative (hereinafter called "Lloyd's underwriters"), for 215*l.* on increased value of cargo by declaration made on September 28, 1934, against a floating increased value policy for 5000*l.*, which was dated September 5, 1934.

After leaving Naples, the *Penthames* loaded at Carrara on September 19, at Genoa on the 20th, at Marseilles on the 21st and 22nd, and at Denia on the 24th and 26th. Subsequently, while the vessel was on the way to Alicante for further cargo she went aground off Cape Huertas on September 27.

(1) [1936] 2 K. B. 121.

In order that the vessel might be refloated some of her cargo was discharged into lighters, and some further cargo, including the cargo owners' consignment, was jettisoned and lost. The vessel was refloated, and berthed at Alicante on October 3, 1934.

On October 9, 1934, the cargo owners made a claim on the company under their policies for a total loss. That claim was taken down by the company and paid on November 5, 1934. On November 3 the cargo owners signed and handed to the company a letter of subrogation.

As a further consequence of the mishap to the *Penthames*, the cargo owners made a claim on Lloyd's underwriters under the increased value policy for a total loss. That claim was taken down on October 26, 1934, and paid on December 11, The cargo owners then handed to Lloyd's underwriters a letter of subrogation dated December, 1934.

In due course a general average adjustment, dated June 29, 1935, was prepared. In the adjustment the consignment of wheaten sharps ranked for allowance in the sum of 900*l.*, which was its nett sound arrived value, and after deducting the general average contribution of the cargo the balance to be received by the cargo owners amounted to 532*l.* 4*s.* 8*d.*, and that sum of money was in the hands of the shipowners and the adjusters as trustees. It was not disputed that the balance was correctly arrived at by the adjusters.

The company claimed to be entitled to the whole of the 532*l.* 4*s.* 8*d.* under their subrogation rights, but Lloyd's underwriters claimed to be entitled to 127*l.* 2*s.* 11*d.* of that sum as representing the proportion of the general average allowance applicable to the increased value policy. They also claimed under their rights of subrogation. The company had no knowledge of the existence of the increased value policy until after they had paid for a total loss.

Branson J. held that Lloyd's underwriters were not entitled to contribution, but that the company were entitled to receive the whole of the salvage.

Lloyd's underwriters appealed. The appeal was heard on February 11 and 12, 1937.

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Cyril Miller for the appellants. When the insurance company paid on their policy and obtained a letter of subrogation from the cargo owners, these owners had already taken out the increased value policy and they could not pass the right to receive salvage without regard to the rights of the appellants under the increased value policy. The appellants had an inchoate right of subrogation from the time the increased value policy was taken out and this right crystallized when they paid on the policy. *North of England Iron Steamship Insurance Association* v. *Armstrong* (1) runs to some extent contrary to that view but it has been the subject of criticism: see *S.S. Balmoral Co.* v. *Marten* (2), and *The Commonwealth* (3); but it seems to have been followed in *Thames & Mersey Marine Insurance Co.* v. *British & Chilian Steam Ship Co.* (4)

[Lord Wright M.R. The Court is, I think, bound by this decision.]

That being so, it becomes necessary to argue the case on that footing.

[Romer L.J. Branson J. seems to assume that since the passing of s. 79 of the Marine Insurance Act, 1906, subrogation takes place under that Act and not at common law.]

The section, however, throws no light on the rights of the Standard Co. as soon as they obtained the letter of subrogation.

[Lord Wright M.R. The trouble is that the policies were valued policies and the value of the whole goods as stated in the Standard Co.'s policy is conclusive. Therefore it is difficult to introduce any different value.]

That is what will be said against the appellant's contention. It is necessary, however, to examine the authorities which are stated conveniently in Arnould on Marine Insurance, 11th ed., vol. ii, p. 1579, s. 1228.

[Lord Wright M.R. If the decision in *North of England Iron Steamship Insurance Association* v. *Armstrong* (1) is right, how do the appellants claim to succeed?]

(1) (1870) L. R. 5 Q. B. 244.
(2) [1902] A. C. 511.
(3) [1907] P. 216.
(4) [1915] 2 K. B. 214.

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In that case there was only one underwriter and the whole question was between the underwriter and the assured. It is different where there is a second underwriter on the risk. When this is so the assured by taking payment from one underwriter first cannot affect the other's right of subrogation. It is true that this is not a case of double insurance, but it would not be fair to say that while the underwriters of the increased value policy pay they have no right of subrogation. Their rights exist in an inchoate form from the moment that the contract of insurance was entered into.

Branson J. relied on a statement in Phillips on Insurance (5th ed., 1867), vol. ii, para. 1715. Reliance is here placed on *S.S. Balmoral Co.* v. *Marten*, (1) which shows that insurers are entitled to share in salvage in proportion to the risks undertaken. There is no case directly in point on the present case as the authorities generally relate to double insurance.

[LORD WRIGHT M.R. The difficulty here is that the value under the original policy was not increased when the increased value policy was taken out.]

It would be inequitable that the original insurers should take the whole of the salvage.

[ROMER L.J. Is it clear that s. 32 of the Marine Insurance Act, 1906, does not refer to increased value policies ?]

It would suit the appellants to argue the contrary but on the construction of the section this is scarcely open.

Branson J. has not regarded s. 79 of the Act as exhaustive in regard to the rights of subrogation, but has added as proviso that the insurer cannot recover more than he has paid. This shows that his right is not absolute and in fairness the underwriters of the increased value policy should take a share of the salvage.

W. L. McNair for the respondents. The respondents were insurers for the entire value and therefore they had conferred on them on the issue of the policy a right to be subrogated in regard to 100*l.* per cent. of anything recovered by the assured up to the amount they had paid. That is therefore a right to receive any sum recovered up to the full value of 685*l.* That

(1) [1902] A. C. 511.

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policy does not expressly or by necessary implication confer a right to take out an increased value policy in derogation of their rights. Such a clause is frequently inserted, and it would be indeed strange if the underwriters had the same right here in respect of the increased value policy as though such a clause had been inserted in the insurance policy.

How can there be an equitable right conferred by the assured in a contract to which the Standard Co. were not parties depriving them of rights conferred on them by their policy ? There is no authority in favour of such a contract and there is authority to the contrary : see Phillips on Insurance (5th ed., 1867), vol. ii, para. 1715.

[Lord Wright M.R. referred to the observations of Lord Brampton in *S.S. Balmoral Co.* v. *Marten.* (1)]

Those observations are not in a line with the other authorities.

[He also referred to *Bruce* v. *Jones.* (2)]

Lord Wright M.R. This is an appeal from a judgment of Branson J. which raises a short but interesting point of marine insurance law, a point which, so far as I know, is not covered by any authority. The question is, where you have an insurance on a consignment or a cargo by the goods owner valued at a certain amount, and insured to the full extent of that value, and then you have a later additional or supplementary insurance on the same goods on what is called increased value, for a further amount, valued at that increased value figure, and the goods are lost by being jettisoned so that the goods owner is entitled to be recouped in general average, which of the two sets of underwriters have claims to be subrogated to the amount of the general average contribution so recovered by the goods owner ? ; that is to say, is the underwriter on the primary policy entitled to be subrogated to the whole, or must he share with the underwriters on the later or supplementary policy on increased value ? In stating that question I have not added one element which might be of considerable importance in a certain event. I have not stated that for the purposes

(1) [1902] A. C. 511, 518.

(2) (1863) 1 H. & C. 769.

of this inquiry the general average contribution is less than the amount covered by the primary policy. If it had been in excess of that amount then a further question would have arisen as to the surplus, but that complication does not arise here.

The action was brought by the plaintiffs against the shipowners claiming a proportion of the general average contribution as adjusted. The claim was for 215/900ths of that sum. It is clear that the plaintiffs in bringing this action were so doing on behalf of the increased value underwriters, and that the real question involved a matter of competition between the two sets of underwriters. That being so, it was very conveniently ordered, no doubt by agreement, that the issue should be tried out as between these two parties, and the shipowners, who had no interest in the matter at all, dropped out. Therefore, the two litigating parties here are the first underwriters, the Standard Marine Insurance Co. on the one hand, and the increased value underwriters, who are Lloyd's underwriters, on the other hand. The consignment in question was a consignment of wheat offals shipped from an Italian port. The shippers had sold a consignment to the nominal plaintiffs, and had transferred to them the usual shipping documents, which included the Standard Marine policy for 685*l.*, which was the invoice amount. The policy was a valued policy, and the total valuation was 685*l.* I shall refer to the terms of that policy in a moment. After the plaintiffs had taken over the documents it appeared to them that the value of the consignment had increased above the invoice amount, and thereupon they effected a further policy for 215*l.* on the increased value so valued. I say that they effected a further policy, but in fact what they did was to make a declaration against a floating policy for a total amount of 5000*l.* in which they were interested as assured. On the voyage the vessel, which had loaded at Naples with the consignment in question, got into trouble and went aground off Cape Huertas on September 27, 1934. She was finally refloated, but the consignment in question was jettisoned and became a total loss, and the general average contribution to the cargo owner in respect of that loss by jettison was adjusted at 532*l.* 4*s.* 8*d.* That is the sum about which this battle rages. The increased value underwriters claim that they are entitled to 127*l.* 2*s.* 11*d.* as a sum to which they are subrogated under their policies, leaving the balance to the Standard Marine Co. That sum of 127*l.* 2*s.* 11*d.* is arrived at by taking the net arrived value of the consignment of 900*l.*, which is the sum of 685*l.* and 215*l.*, the two amounts insured. The Standard Marine Co. claim that they are entitled to the whole amount on the ground that it is theirs by subrogation. The two policies differ in their terms. I ought to say the three policies because the amount covered by the Standard Marine Co., though coming in all to 685*l.*, is covered by two policies which, however, are in identical terms, and both dated September 19, 1934. They are " Subject to flour ' all risks ' clauses as attached." They are both valued policies, each on a separate portion of the consignment, but they add up, taken together, to an insurance for 685*l.* on cargo which altogether is valued at 685*l.* The Lloyd's policy, the floating policy, is in a different form. It is an F.P.A. policy subject to the F.P.A. clauses issued by the London Corn Trade Association, and contains clauses for use in increased value policies. It purports to be a floating policy on " increased value on grain and/or meal and/or cake to be declared and valued hereafter at the difference between the purchase price and highest market value during voyage." In this case that valuation for the purposes of this policy on increased value is fixed at 215*l.*, which was the amount declared and duly written off the floating policy. There are only two clauses in that policy to which I need call special notice. One is the clause at the end of the general F.P.A. clauses not specifically appropriated to the increased value policy, which is in these terms : " In the event of any additional insurance being placed by the assured for the time being on the cargo herein insured, the value stated in this policy shall, in the event of loss or claim, be deemed to be increased to the total amount insured at the time of loss or accident." That means, if you have what I may call an ordinary policy, and you effect an additional insurance on the same cargo or parcel, then the original policy value is to be increased to the total of the two values if the case is limited to the two values; that is to say, applying that to the present case, if the first policy had been a policy with these clauses for 685*l.* on the consignment valued at 685*l.*, then when the 215*l.* of increased value was covered the value in the former policy would be increased to 900*l.* That is a businesslike arrangement providing for this particular state of things, and intended to have the effect of eliminating any such questions as arose in this case. There are two further clauses added to apply to increased value policies, and the second of those clauses is in the same terms as the additional insurance clause which I have just read, and will have the effect of applying that clause to a case where, after one increased value policy has been effected, another is taken out. These are the policies. There are only two other facts to which I need refer. One is that a subrogation letter in the usual form was signed by the goods owners in favour of the Standard Marine Insurance Co. That was dated November 3, 1934. Later, on December 14, 1934, the goods owners signed a subrogation letter in favour of the Lloyd's underwriters. The former of these letters related to the sum of 685*l.* and recited that that sum had been paid as for a total loss under the Standard Marine policy. The second of these letters referred to the policy for 215*l.* on the increased value, and recited that that amount had been paid.

In those circumstances, it seems to me, agreeing with the learned judge, that the claim of the Lloyd's underwriters is ill-founded. I come to that conclusion on the clear words of s. 79 of the Marine Insurance Act, 1906: " Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby "—these are the material words—" subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss." Those words merely give effect to a well recognized rule of law, subject to one point which is, however, not here material, applying to subrogation : "Subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss." The result is, that it is an integral condition of this policy that the Standard Marine Co. has a contingent right of subrogation which attaches and vests in them at the moment when the policy is effected. It is contingent in the sense that the state of affairs postulated may never arise, but the contingent right is there, and here the contingency has arisen, and the right vested as a contingency has become an effective right. In the facts of this case I can see no answer to that conclusion. We are not here troubled with the question which has been greatly debated, whether under s. 79, and the earlier cases on which it was based, the right of subrogation in such a case—if it is a question of subrogation and not abandonment—would extend and give the underwriter a right or remedy exceeding in value the amount for which he is liable under his policy. So far as that is concerned, the law is now covered in this Court by the decision of the Court of Appeal in *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (1) In that case Swinfen Eady L.J. sums up the matter in this way. He quotes the section which I have read, and then he says : "What the underwriters are really saying here is that according to the true construction of the statute they are entitled to be subrogated to all the rights and remedies of the assured in and in respect of the subject-matter of the ship, and not to part of it only. In my opinion the Act embodies the law as laid down in *North of England Iron Steamship Insurance Association* v. *Armstrong* (2), and the judgment below was right on this point and the plaintiffs are entitled to recover from the shipowners"—the plaintiffs were the underwriters—"all the sums which the shipowners received in respect of the ship"—then come the material words—"up to the 45,000*l*., the amount of the insurance."

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(1) (1915) 21 Com. Cas. 150, 152.

(2) L. R. 5 Q. B. 244.

Applying that here, the plaintiffs, the underwriters, are entitled to recover all the sums which the shipowners received in respect of cargo up to the 685*l*., which is the amount of the insurance. Now, as I say, that limitation may be accepted here without question, because the amount of the general average contribution recovered is 532*l*., while the amount of the insurance is 685*l*.

The position would have been different if this had been a case of double insurance under s. 32 of the Act, but Mr. Miller has very fairly pointed out that it cannot be so regarded. In the case of double insurance, obviously, as the two sets of underwriters have to share the burden, they would be entitled to the proportionate benefit of any sums which went in reduction of the burden, and they would share both the amount of the indemnity which had to be paid, and against that they would be entitled to share the salvage in regard to which they were entitled to be subrogated in reduction of that indemnity. There is no such question here. The case here is that of a subsequent and subsidiary insurance, an increased value insurance, which is effected by way of supplement for the goods owner's convenience in order to make up what he regards as the full value over and above the first insurance. The first insurance is on the whole of the subject-matter, and is on the subject-matter for its full value for purposes of that policy, and as between the goods owners the underwriters of that policy. As that is so, they are entitled to the full rights the subrogation. There is no circumstance here which would justify any reopening of the valuation, or any supersession of the valuation between those parties such as might arise in the case of a constructive total loss, or as might come into question in such a case as *The Balmoral* case (1) which did not deal with rights of subrogation, but with a different question, namely, the liability of an underwriter to shipowners who were claiming for a partial loss in respect of general average and salvage charges. It was held in *The Balmoral* case (1) that in those circumstances,

(1) [1902] A. C. 511.

the valuation had to be brought into consideration, because if the general average and the salvage charges were adjusted on a higher valuation than that which appeared in the policy the underwriters were only liable in the proportion which the insured value bore to the value for the purposes of the adjustment. That is an entirely different question, and is dealt with, in fact, under a different section of the Act—namely, s. 73. I cannot find any guidance in that case for present purposes. Mr. Miller has read a passage from Lord Brampton's judgment in *The Balmoral* case (1), but I need not discuss that passage in detail, because it seems to me not to afford any help in this case. It was dealing with a different question—namely, the right of the shipowners to claim against the underwriters in such a case as I have stated. It was before the Act, and there are some aspects of what Lord Brampton said which I find it difficult to follow. However that may be, it affords no assistance, in my judgment, in the present case.

Mr. Miller's main argument appears to have been based upon the letters of subrogation. He claims that because the goods owners have assigned to the Lloyd's underwriters a share of the salvage, that share has been properly vested in the Lloyd's underwriters, and on that ground they are entitled to succeed in their claim here, but it seems to me that if that were done the effect of it would be that the rights of the Standard Marine Co. to subrogation in the sense which I have explained would be prejudiced if they are entitled, as I think they are, to the whole of the rights and remedies of the assured. Any attempt by the assured to dispose of the value of those rights and remedies in any other direction, whether to increased value underwriters or to anyone else, would, to my mind, either be futile, or, if in fact the rights of the Standard Marine Co. were affected, would entitle the Standard Marine Co. to bring an action against the goods owners to recover from them to the extent that their valuable rights of subrogation had been prejudiced. I need not refer to authorities, because that has long been established. What I think is at the basis of the contention of the Lloyd's

(1) [1902] A. C. 519.

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underwriters is, that there is an implied term in the original policy, the policy for 685*l.*, entitling the goods owners, if the value of the cargo does rise, to take out an increased value policy, and to take out such a policy as would rank pari passu with the first and main policy, but I cannot see any foundation for that argument at all. It is perfectly clear that if the Standard Marine policy had contained a clause analogous to that which I have read from the F.P.A. clauses in the Lloyd's policy, there would have been an express vesting of such a right in the goods owner, and the matter could have been worked out in accordance with that intention on businesslike lines by increasing the total valuation under both policies to the valuation of the two policies taken together. But nothing of the sort has been done here, and in the absence of an express clause I cannot imply any such intention in the original policy. In this connection it is useful to refer to a short passage in Phillips on Insurance, vol. ii, at p. 386, where the learned author says: " The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right." Then the learned author adds this: " Upon this principle, the amount of salvage to which one underwriter may be entitled upon an abandonment "—I think that is meant to include subrogation—" ought not to be diminished in consequence of any particular agreement between the assured and other underwriters on the same subject." I think that rule applies here. Under all those circumstances, it seems to me that there is no foundation for any argument that the position under the Standard Marine policies has been in any way affected by the Lloyd's policy, which is for these purposes simply res inter alios acta. That policy does not affect the position between the Standard Marine Co. and the goods owner for any purpose in the facts of this case, and does not prejudice the rights of subrogation of the

Standard Marine Co., nor does any dealing subsequently, such as the letters of subrogation, have any such effect.

I think the judgment of Branson J. was right, and should be affirmed, and the appeal dismissed with costs.

ROMER L.J. In my opinion, on September 28, 1934, when the increased value policy was effected, the Standard Marine Insurance Co. had, by virtue of the decision of this Court in the *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (1), to which the Master of the Rolls has already referred, and by virtue of s. 79 of the Marine Insurance Act, 1906, become contingently entitled to receive the sum of 532*l.* 4*s.* 8*d.*, which is the subject-matter of these proceedings. That right is not one of which the assured could deprive the Standard Marine Insurance Co. I agree that this appeal fails, and must be dismissed with costs.

SCOTT L.J. I agree. There is no section of the Marine Insurance Act, 1906, and no judicial decision which directly covers the question raised in this appeal, but in spite of an attractive and thoughtful argument from Mr. Cyril Miller, I think the law is beyond doubt, and is against him. The decision of the Court of Queen's Bench in *North of England Insurance Association* v. *Armstrong* (2) was definitely approved by the Court of Appeal in *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (1), and is, therefore, binding on us to-day. In the course of his judgment in the latter case, Swinfen Eady L.J. said in terms in the passage which my Lord has quoted, that the Court was affirming, in effect, the decision in the *North of England Insurance Association* case. (2) I think it is important to correct the report of the *Thames and Mersey* case (1) as it is in the Law Reports, (3) because it is stated: "No argument was addressed to the Court upon the point decided by Mr. Justice Scrutton and reported in the Court below."

(1) 21 Com. Cas. 150, 152.

(2) L. R. 5 Q. B. 244.

(3) [1916] 1 K. B. 30, 32.

Then it goes on : " The arguments in the Court of Appeal were limited to the question of fact how much was recovered in the collision proceedings by the assured in respect of the subject-matter insured—namely, the ship." That is incorrect, as appears from the report in 21 Commercial Cases, and one or two other reports, particularly as shown by the passage my Lord has read. The decision in the *North of England* case (1) was that as between the assured and their insurers on a valued policy on hull valued at 6000*l.*, the whole of a sum of about 5000*l.* recovered from the owners of a vessel which had been held in fault for the loss of the insured vessel, belonged to the insurers as salvage to which they were entitled by virtue of their right of subrogation. It was argued for the assured that because the real value of the vessel had been 9000*l.* and because the damages recovered in the collision action had been assessed in the light of that value, they were entitled to share to the extent of one-third, or 3000/9000ths, in the amount recovered, but the Court held that the valuation was binding as between the assured and the insurers, and that up to that amount any damages recovered belonged to the insurers as salvage, because the assured were estopped from saying that the value of the vessel in respect of which they had been paid damages was anything different from the value agreed in the policy. In the present case if the shipowners had paid the net amount of the general average statement of 532*l.* 4*s.* 8*d.* direct to the assured, and the Standard Marine Insurance Co. had thereupon sued the assured for that sum as money had and received, the assured would have had no answer. The two cases above cited, as well as others, are, in my view, clear authority for that conclusion, and the reason would have been the essential nature of a valued policy binding both parties to the agreed valuation. By virtue of that contractual term, the Standard Marine Co.'s right to claim that amount as salvage, it being less than the total valuation of 685*l.* in the two policies, would have attached automatically and instantaneously on its receipt by the assured. In such a case it would be no defence to the assured to plead that they had in effect entered into a Lloyd's increased

(1) L. R. 5 Q. B. 244.

value policy for 215*l.* on the same consignment valued at 900*l.*, because the Standard Marine Co. would have replied that that was res inter alios acta so far as they were concerned, and could not prejudice their contractual right which had already accrued in respect of the whole sum in the hands of the assured, so as to identify it as money had and received for the plaintiffs' use, or possibly even to constitute it a fund held in trust for them. *Bruce* v. *Jones* (1) supports that view. Had the assured in any way prejudiced their rights of recovery so as to deprive the Standard Marine Company of the benefits of subrogation, the assured would have incurred a personal liability to the Company to the extent of the prejudice so caused. *West of England Fire Insurance Co.* v. *Isaacs* (2), and *Phœnix Assurance Co.* v. *Spooner* (3), are authorities for that proposition. Now, if my view of what the hypothetical position would have been if the fund had got to the hands of the assured is legally correct, as I think it is, it really establishes the conclusion of law which Mr. McNair has submitted to us to-day—namely, that if the assured wanted to keep open a liberty to take out an additional policy on the same subject-matter on a higher valuation, he ought to have obtained the consent of the Standard Marine Co. to include in their policy the Institute clause which was subsequently, in fact, attached to the Lloyd's policy on increased values, in the words which my Lord has already read out, and which I need not repeat. Had the assured reserved that right, his subsequent Lloyd's policy would have been within the contemplation of that clause, and, therefore, not res inter alios acta. I added just now: "on a higher valuation," because, of course, if the additional policy had been on the same valuation it would have been irrelevant to any question here, since it would have simply produced a case of double insurance. Without the special Institute clause in the Standard Marine policy, I think the assured is estopped by the valuation clause from alleging that the subject-matter of the insurance ever had any increased value—i.e. a value above the value agreed to in the Standard Marine policy; and if the assured is so estopped, I think that the subsequent insurer, standing, as he must, in his assured's shoes, is equally estopped. At first I was attracted by Mr. Miller's argument that there must be an equity between the two insurers to share in the salvage, resting on the same sort of principle as that of contribution between co-sureties,—an equity independent of the terms of the statute, though analogous to the principle applicable in certain cases of double insurance. But I think Mr. McNair gave the true answer to that contention—namely, that Lloyd's underwriters could only derive title, so to speak, through their assured, and that to the extent of the Standard Marine Co.'s rights of subrogation, their assured had parted with his interest in any salvage he might recover. This answer accords with the conclusion expressed by Romer L.J. in his short judgment just now. The letters of subrogation are irrelevant to any question, if that be the right view of the law. Whether they constitute contracts for good consideration upon which an action could be brought does not arise, and I express no opinion as to whether the Lloyd's underwriters had any rights against their assured in the circumstances.

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(1) 1 H. & C. 769.

(2) [1897] 1 Q. B. 226.

(3) (1905) 10 Com. Cas. 282.

I agree that the appeal should be dismissed with costs, and that we should affirm the judgment of the Court below.

Appeal dismissed.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover.*

Solicitors for respondents: *Botterell & Roche for Weightman, Pedder & Co., Liverpool.*

W. I. C.

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HOPE AND ANOTHER *v.* GREAT WESTERN RAILWAY COMPANY.

Practice—Trial by jury—Right of party to trial by judge without jury—Discretion of Court or judge—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 99, *sub-s.* 1 (*h*)—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 6—*Rules of Supreme Court, Order* XXXVI., *rr.* 1–7.

In an action brought in the King's Bench Division of the High Court by a young girl against a railway company for damages for severe personal injuries alleged to have been caused by the negligence of the defendants' servants, the judge at Chambers made an order, affirming an order of the Master, that the action should be tried by a judge and jury. The defendants appealed to the Court of Appeal for an order setting aside the order of the judge and directing that the action should be tried by a judge alone :—

Held, by the full Court of Appeal, that under the appropriate provisions of the Rules of the Supreme Court, Order XXXVI., rr. 1–7, in their present form, that is to say as altered and rendered subject to the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6, by the addition to r. 1 of the proviso thereto, and under that section, it was completely within the discretion of the judge to order the action to be tried either with or without a jury, and that the Court would not interfere with the order which he had made in the exercise of that discretion.

Keeling v. *Cook* (1934) 78 L. J. Jo. 306, explained.

APPEAL from an order of Lewis J.

The plaintiff, Reginald Hope, was a farmer residing at Claverdon, in the county of Warwick, and the plaintiff, Vera Hope, his daughter, an infant, also resided there, and up to the time of the accident hereinafter mentioned she had been employed as an apprentice to a ladies' hairdresser in Birmingham.

The defendants, the Great Western Railway Company, were owners and occupiers of the Claverdon railway station.

On October 23, 1936, the infant plaintiff by the senior plaintiff as her next friend, and the senior plaintiff brought the present action in the High Court against the defendants claiming damages for personal injuries sustained by the infant plaintiff by breach of agreement and negligence.

The plaintiffs stated in their statement of claim that on

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November 28, 1935, the infant plaintiff and the defendants entered into an agreement by which the defendants undertook for reward to transport her on their trains between Claverdon station and Birmingham for three months and for that purpose to admit her to that station; that it was an implied term of that agreement that the defendants promised or warranted that their said station should be as safe as reasonable skill and care could make it; that on December 5, 1935, the defendants, their servants or agents, in breach of their promise or warranty, or negligently, permitted the platform at that station to be in a slippery and dangerous condition, by allowing ice to accumulate upon it and by failing to put sand or cinders upon it or taking any proper precautions to render it safe, whereby the infant plaintiff slipped and fell twice and on the second occasion fell under a train as it drew alongside the platform; and that she was thereby caused severe personal injuries and loss, and the senior plaintiff had been put to expense and suffered loss also, for all which loss the plaintiffs claimed damages.

The defendants in their defence said that it was the duty of the infant plaintiff in using the said platform to exercise reasonable care for her own safety; that the defendants denied that they, their servants or agents, were guilty of any breach of agreement or warranty or of any negligence as alleged; that the said falls and each of them were caused solely, or, alternatively, contributed to, by the infant plaintiff's breach of duty or negligence; and that the said falls and each of them were not due to any breach of agreement or default on the part of the defendants, their servants or agents, but were caused solely by the infant plaintiff having fainted or become giddy and overbalanced.

On December 16, 1936, the Master made an order that the action be tried at Birmingham with a judge and special jury at the defendants' instance.

On January 12, 1937, Lewis J. made an order dismissing an appeal by the defendants from the order of the Master.

The defendants gave notice of appeal dated January 21, 1937, to the Court of Appeal for an order that the order of

Lewis J. might be set aside, and that it might be ordered that the action be tried at Birmingham with a judge alone.

H. Saunders for the defendants, appellants. The order of Lewis J. that the action should be tried by a judge and jury was wrong and should be set aside, and an order made that the action should be tried by a judge alone. The claim of the plaintiffs to have the action tried by a judge and jury would seem to be made under R. S. C., Order XXXVI., rr. 2 and 6 (1), the former of these rules providing that in every cause, unless under r. 6 (1) of the Order a trial with a jury is ordered, the mode of trial shall be by a judge without a jury, provided that in any such case the Court or a judge may at any time order any cause to be tried by a judge with a jury; and the latter rule providing that in any cause other than those mentioned in rr. 3, 4 and 5 of the Order (1), which are not relevant to the present case, upon the application of any party thereto for a trial with a jury an order shall be made for a trial with a jury. These rules, however, like the other rules of that Order, are to be read along with the proviso to r. 1 (1)—namely, that rr. 1–7 of the Order (1) shall have effect subject to the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933. Sect. 6, sub-s. 1 (1), of that Act of 1933 provides by the earlier part of it that, subject as thereinafter provided, if on the application of any party to an action to be tried in the King's Bench Division of the High Court, the Court or a judge is satisfied that it comes within categories (*a*) or (*b*), which do not include an action such as the present, it shall be ordered to be tried with a jury unless the Court or judge is of opinion that it cannot conveniently be so tried. That part of the sub-section preserves the right to a trial by jury of an action falling within these categories, subject to the opinion of the Court or judge as to the convenience of a trial by jury. The inference would seem to be that in other actions, such as the present, a party desiring a jury must show that the action

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(1) The material provisions of the Acts and rules relating to trial by jury are sufficiently set out below in the judgment of Lord Wright M.R.

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not only can be but ought to be tried with a jury. It is true that the latter part of that sub-section provides in effect that any action, not coming within these categories, to be tried in the King's Bench Division " may in the discretion of the Court or a judge be ordered to be tried either with or without a jury." But that part of the sub-section is closely connected with the previous part, and, that being so, it ought not to be read as giving to the Court or judge an absolute discretion, but only a qualified or limited discretion to be determined by showing good reason why the action should be tried with a jury. That view is supported by the observations of Lord Hanworth M.R. in *Keeling* v. *Cook* (1) where he said that under s. 6 of the Act of 1933 there is no right to a jury merely at the demand of a party except in the cases which are dealt with specifically in sub-s. 1 of that section, but that any action may, in the discretion of the Court or a judge, be ordered to be tried either with or without a jury, and that he thought that meant that " the general practice would be that unless some reason is shown why there ought to be a jury, the discretion would usually be exercised against having a jury." These observations, indeed, seem to imply that there is no longer any right to a jury even in cases coming under the first part of the sub-section, and that, unless some good reason can be shown to the contrary, the Court or judge should in their discretion refuse to order trial by jury. It has certainly never been decided that under the Acts and rules the Court or a judge has an absolute discretion to allow or refuse a jury. Even where the rules have expressly given the Court or a judge a discretion to order the trial of an action either with or without a jury, the party desiring a jury has not such a prima facie right to a jury as to throw on the other side the burden of showing that the action can be tried as well without a jury: *Timson* v. *Wilson* (2); but the onus is on that party of showing some good reason why the trial should be by jury: *Jenkins* v. *Bushby*. (3) The Court or a judge in allowing a defendant leave to defend under Order XIV.,

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(1) (1934) 78 L. J. Jo. 306.
(2) (1888) 38 Ch. D. 72.
(3) [1891] 1 Ch. 484.

r. 6, may, notwithstanding Order xxxvi., r. 6, add the condition that the case shall be tried by a judge without a jury. The history of the Acts and Orders relating to trial by jury may be shortly summarized. From 1883 down to 1917 Order xxxvi., r. 7, preserved the right of parties to a trial by jury except in certain cases. In 1917 that Order was re-drafted and rr. 2 and 6 thereof gave the parties a right to trial by jury. The Administration of Justice Act, 1920, s. 2, in effect deprived the parties of a right to a jury in all cases, except in cases involving reputation. The Administration of Justice Act, 1925, s. 99, sub-s. 1, gave power to make rules prescribing in what cases trials should be with or without a jury, and provided that until such rules were made those of 1917 should be restored, and under that Act Order xxxvi., rr. 1–7, were made or continued in force, the right to a jury being thus restored, except in certain cases. Finally, the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6, was passed, and the proviso was added to Order xxxvi., r. 1, which made rr. 1–7 of that Order subject to that section, with the result that a party has now no absolute right to a trial by jury, the power to order such a trial being left to the discretion of the Court, which, it is submitted, can only be exercised on good cause being shown. Further, the learned judge in making the order under appeal did not appreciate that in a case of this nature the position of the defendants must be more difficult before a judge and jury than before a judge alone, inasmuch as the sympathy of the jury for the plaintiff must be an element adverse to the defendants. Under the Act and rules the discretion of the Court or judge to order the trial of the action by a judge and jury should not be exercised in the absence of good cause shown for that mode of trial, and here no good cause has been shown by the plaintiff.

R. A. Willes for the plaintiffs, respondents, was not called upon to argue.

Lord Wright M.R. This is an appeal by leave from an order of Lewis J. affirming an order of the Master ordering that the action should be tried at Birmingham with a judge and special jury. Mr. Saunders, who has argued the case very excellently, has put his contention mainly on the ground of principle. He has submitted that, on the true construction of the Act and rules relating to trial by jury as they now stand, the party applying for a jury has to show some special cause or reason why a jury should be ordered. He has contested the proposition that the question is left at large to the discretion of the Court or a judge without there being a presumption or a bias in favour of the view that prima facie there shall be no jury. He has contended that in this case the exercise of the discretion by the master and the judge should be set aside and the order for a jury refused, because, he says, they have not applied the true standard, inasmuch as they have not proceeded on the basis that they ought not to order a jury unless special cause is shown, but have proceeded on the basis that it was a matter for their discretion, and on that ground he asks the Court to reverse this order. In my judgment these contentions are not well founded, and so far as they may have been thought to receive colour from certain observations made by the late Master of the Rolls, Lord Hanworth, in a case of *Keeling* v. *Cook* (1), I think they are based on a misapprehension of what the learned judge meant or said.

Before dealing with these observations I will first consider the relevant rules and Acts. The rules at present in force, namely, rr. 1 to 7, of Order XXXVI., which deal, among other things, with mode of trial were promulgated by the Rules Committee under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, which provides: "Rules of Court may be made under this Act for the following purposes," and among others "For prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury." It is obvious that no limitation is there put on the form of the rules or the conditions under which they are to be made, the Rules Committee having the matter entirely within their power. It was under those conditions that the rules 1 to 7 were made.

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(1) 78 L. J. Jo. 306.

Going back to the earlier history before 1925, and dealing with it in the most summary way, I think I can state it for this purpose very clearly and compendiously by a reference to the case of *Kodak, Ld.* v. *Alpha Film Corporation, Ld.* (1), where Greer L.J. dealt with the question whether the rules now under consideration were ultra vires. He said: "In *Ford* v. *Blurton* (2) Bankes L.J. points out that until the year 1854 it was the undoubted right of every litigant in the Common Law Courts to have his case tried by a jury. This right was not restricted by the Common Law Procedure Act, 1854, except in cases of account. That Act also made provision for trial without a jury by consent of the parties. A radical change was made by the Judicature Act, 1873. For the first time power was conferred on the King in Council to legislate on the question what cases should be tried by a judge alone and what cases should be tried by judge and jury, by Rules of Court for regulating any matters relating to practice and procedure: see 36 & 37 Vict. c. 66, s. 68. As soon as the Act came into force the rules contained in the Schedule were to operate until they were altered by a majority of the judges of the Supreme Court of whom the Lord Chancellor was to be one. The rules had to be laid before Parliament and might be annulled." (3) Then, to pass over a little, the Lord Justice proceeds: "Order XXXVI., rule 7 (*a*), which was the rule in operation from 1883 onwards, preserved the right to trials by jury except in certain specified cases." (4) Then, after considering some further alterations in the rules, the Lord Justice continues: "In consequence of the War it became increasingly difficult to find juries for the trial of common law cases, and in July, 1918, an Act of Parliament was passed (5) providing that trial should be by judge alone, except in cases where fraud was alleged, cases of libel, slander, false imprisonment, malicious prosecution, seduction or breach

(1) [1930] 2 K. B. 340.
(2) (1922) 38 Times L. R. 801.
(3) [1930] 2 K. B. 354.
(4) [1930] 2 K. B. 355.
(5) The Juries Act, 1918 (8 & 9 Geo. 5, c. 23).

of promise of marriage, and in cases where it appeared to the Court that any question or issue was more fit to be tried with a jury than without a jury. Sect. 2 of the Administration of Justice Act, 1920, again altered the law by enacting that the Court or a judge should have power, on the application of either party, to order trial without a jury if he thought that the case could not be as conveniently tried with a jury as without a jury, but this was not to apply to the cases involving reputation which were enumerated in proviso (*a*). This statute had the effect of depriving the parties of a right to a jury in all cases except those mentioned in the proviso and leaving the question of the mode of trial in all other cases to the discretion of the judge in chambers. The Act received a good deal of criticism, and in 1925 it was decided by Parliament that the state of the law as it existed before 1918 should be restored." (1) That was done, the learned judge adds, by the Administration of Justice Act, 1925.

In *Ford* v. *Blurton* (2) Bankes L.J., in reference to the changes that had been made in the rules before 1925, made this observation: "What was once an undoubted right and in the opinion of many persons (myself included) a most valuable right, has been gradually eaten into, until at last, if the recently issued provisional rule is to be made permanent, it has been entirely taken away. It is in the hope that on further consideration of the matter the right may be restored and the necessary limitation upon the right clearly defined, that I am calling attention shortly to the steps by which the present position has been brought about." (3) That was the view of the very experienced Lord Justice, and it was in consequence of that and other similar expressions of opinion that the Act of 1925 amended the law and gave the Rules Committee the full jurisdiction which they now have, subject, of course, to any legislation.

The legislation in question on which this issue turns is s. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933. I will read the section and then come back to the

(1) [1930] 2 K. B. 355, 356.
(2) 38 Times L. R. 801.
(3) Ibid. 802.

rules. The section provides : " Subject as hereinafter provided, if, on the application of any party to an action to be tried in the King's Bench Division of the High Court made not later than such time before the trial as may be limited by rules of court, the Court or a Judge is satisfied that (*a*) a charge of fraud against that party ; or (*b*) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, is in issue, the action shall be ordered to be tried with a jury unless the Court or Judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury ; but, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a Judge, be ordered to be tried either with or without a jury : . . . ." On the face of it that section is putting the matter completely within the discretion of the Court or a judge without any such qualifications as had been imposed by the Act of 1925. The matter is put as one of discretion, and a discretion such as that described by Kay L.J. in *Jenkins* v. *Bushby* (1), where he said : " Of course, in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were, the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion." These final words seem to me to be most significant. Sect. 6 of the Act of 1933, which is the overriding provision for this purpose, leaves the matter to the discretion of the Court or a judge. They, with their experience and their knowledge of procedure being fitted to judge of the nature of the cases and questions which are likely to arise and the evidence which is likely to be given, and also, in view of the background of the whole of the history of the Courts in relation to trials, with or without a jury, in common law actions, are to apply their completely untrammelled discretion to the circumstances and the facts of each particular case.

(1) [1891] 1 Ch. 484, 495.

I cannot however leave the matter there. It is necessary to look back at the rules, because under the Act of 1933 the rules then existing, which were made under the Judicature Act, 1925, though not re-written, were modified. What was done was simply to add to Order XXXVI., r. 1, this proviso: " Provided that this Rule and Rules 1A, 2, 3, 4, 5, 6 and 7 of this Order shall have effect subject to the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933." That proviso thus introduces section 6 of the Act of 1933 into the rules as an overriding provision. The rules to which I ought to refer now are these. Rule 2 says that, unless under the provisions of r. 6 a trial with a jury is ordered, the mode of trial shall be by a judge without a jury; and then there is a further provision as to assessors. Rule 3 says that causes or matters assigned by the Act to the Chancery Division shall be tried by a judge without a jury, which is the normal procedure. Rule 4 deals with the position of cases which before the Judicature Act, 1873, could, without any consent of parties, have been tried without a jury. Rule 5 gives the Court or a judge the specific discretion that they " may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury." That is to be read now with the discretion, otherwise unlimited, which I have shown is given by s. 6 of the Administration of Justice Act, 1933. Rule 6 states the general rule that " In any cause, matter, or issue other than those mentioned in Rules 3, 4, and 5 of this Order, upon the application . . . . of any party " for a jury, " an order shall be made for a trial with a jury." It is that rule which is principally qualified by s. 6 of the Act of 1933, but neither as a matter of history nor of what is to be found in the rules existing in 1933 can I find any justification at all for putting any limitation on the clear words, as I regard them, of the section which leaves the matter completely in the discretion of the Court or a judge, a discretion which now is only qualified by the specific discretion under r. 5.

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For all these reasons I think that if the learned judge or the master had proceeded on the assumption that it was necessary to show a special cause to justify him in making an order he would have been guilty of an error in law in doing so. He did not do so; he exercised his discretion.

I will only add a few words on the judgment of Lord Hanworth M.R., in the case of *Keeling* v. *Cook*. (1) It seems to me that the language there used has been completely misapprehended. I do not think that the late Master of the Rolls was intending to lay down any particular construction of s. 6. He says: "Though it is not necessary to decide the point in this case, I think that means, inasmuch as the statute is condescending to the particular, that the general practice would be that, unless some reason is shown why there ought to be a jury, the discretion would usually be exercised against having a jury. It is unnecessary to determine that in this case." I do not gather from that statement that the learned judge was giving any decision as to the true construction of the statute. He says in terms that he is not deciding any such question. I think that he was merely expressing an opinion with reference to the particular case before him. If he was going on to say that in such cases the discretion in his opinion would usually be exercised against having a jury, I do not know precisely what effect could be given to that statement, because it is perfectly clear that if a discretion is given in the terms in which it is given under the section of the Act in question, it is meant to be a discretion in the true sense of the term, to be used by the Court or a judge having regard to all the circumstances of the case, judicially exercised. It would be impossible to say that he ought to exercise it "usually" in one direction or the other. But I do not think that the late Master of the Rolls was intending to lay down any such general rule, and I think that the effect of what he said has been misapprehended.

The result is that the appeal will be dismissed with costs.

(1) 78 L. J. Jo. 306.

SLESSER L.J. I agree, and have nothing to add.

ROMER L.J. I agree.

GREENE L.J. I agree.

SCOTT L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *A. G. Hubbard.*

Solicitors for respondents: *Ward, Bowie & Co., for Duggan & Elton, Birmingham.*

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BLAUSTEIN *v.* MALTZ, MITCHELL AND COMPANY.

Principal and agent—Solicitor and client—Money obtained by agent on behalf of principal—Money claimed by third party—Action by principal against agent for money had and received by agent to use of principal—Defence of jus tertii—Competence.

An engagement of marriage having been entered into between the plaintiff and the daughter of one J., the engaged parties chose a house in which to live after they were married, and J. handed to the plaintiff a cheque for the deposit on the price of the house as a gift conditional upon the marriage taking place. The plaintiff paid that cheque into his own bank account and handed his own cheque for the same amount to the house agent of the vendor. The plaintiff engaged the defendant, who was J.'s son-in-law, to act as his solicitor in the purchase of the house. The engagement having afterwards been broken off, and the negotiations for the house discontinued, the house agent of the vendor sent a cheque to the defendant for the amount of the repaid deposit. J. requested the defendant to account for the sum to him as being his property, and on that ground the defendant declined to pay it to the plaintiff. J. then made a gift of the sum to the defendant. In an action by the plaintiff against the defendant claiming the sum as money had and received by the defendant to the use of the plaintiff, the defendant by way of defence relied with the consent and authority of J. upon the latter's claim and right to the sum:—

Held (reversing the decision of MacKinnon J.), that in the circumstances the jus tertii of J. did not avail the defendant as a defence to the action.

Roberts v. *Ogilby* (1821) 9 Price, 269 and *Dixon* v. *Hamond* (1819) 2 B. & Ald. 310, applied. *Biddle* v. *Bond* (1865) 6 B. & S. 225; 34 L. J. (Q. B.) 137, distinguished.

In the case of *Biddle* v. *Bond* (1865) 6 B. & S. 225; 34 L. J. (Q. B.) 137, it was decided that to an action by a bailor of goods, which had been wrongfully though not fraudulently acquired by him, against the bailee for the proceeds of sale of the goods, the bailee was entitled to set up the jus tertii of the true owner of the goods as an answer to the action.

Held, that the principle of that case is limited to actions for the recovery of property bailed, and apparently to actions of that kind in which the bailor has wrongfully obtained the property, and cannot be extended to enable an agent, in an action against him by his principal for the recovery of money held by him on behalf of the latter, to set up by way of defence the jus tertii of the true owner of the money.

APPEAL from the judgment of MacKinnon J. in an action tried by him without a jury.

In the end of 1933 an engagement of marriage was entered into between Mr. Leonard Blaustein, the plaintiff, and Miss Sybil Joshpe, a daughter of Mr. Israel Joshpe.

The engaged parties chose a house, at Hampstead Garden Suburb, in which to live after they were married, and the plaintiff signed an agreement to purchase a lease of the house from the owner for 1725*l.*

On September 16, 1934, Mr. Israel Joshpe handed to the plaintiff a cheque for 172*l.* 10*s.*, the amount of the deposit on the price of the house, as a gift conditional upon the marriage taking place.

The plaintiff paid that cheque into his own bank account, and on September 17, 1934, he handed his own cheque for the same amount to the agents of the vendor.

On September 20, 1934, the plaintiff instructed Mr. Isaac Louis Maltz, solicitor, under his firm name of Maltz, Mitchell & Co., a son-in-law of Mr. Israel Joshpe, and the defendant in the present action, to act as his solicitor in the purchase of the house.

In the beginning of October, 1934, the said engagement of marriage was terminated by the parties thereto.

On October 2, 1934, the plaintiff wrote to the defendant in regard to the house: "As I do not wish to go on with the purchase of the above property, kindly take the necessary steps to get the deposit back"; and on receipt of that letter Mr. Maltz communicated with the vendors.

On October 25, 1934, a cheque from the vendor's agents for 172*l.* 10*s.*, the amount of the deposit, was received by the defendant as solicitor for the plaintiff.

On the same date the defendant wrote to the plaintiff mentioning that he had received the cheque and continuing: "Mr. Joshpe has asked me to account for this money to him and not to you, and I understand that you indicated to him that you would give me instructions to account to him accordingly. I should be pleased if you will drop me a line confirming that I am to account to him in respect of the monies received." The plaintiff objected to any such dealing with the money. On November 5, 1934, the plaintiff, proposing that the questions in dispute should be referred to some domestic tribunal, wrote to the defendant requesting him to forward the cheque to a Dr. Feldman, who would deal with the matter further, and adding that he had written to Mr. Joshpe to that effect. On November 6, 1934, the defendant replied: ". . . . I wrote to Mr. Joshpe on Monday of last week, but have not yet had a reply from him, and, accordingly, unless he consents to the action you propose, I cannot part with the cheque in the way you suggest. Perhaps you would ask Mr. Joshpe to write me in similar terms to your letter, when I shall be happy to deal with the cheque as you indicate."

On November 23, 1934, Mr. Joshpe wrote to the defendant: "I shall be pleased if you will send me the 172*l.* 10*s.* which was sent to you by the estate agent. . . . . I handed Leonard" (the plaintiff) "the money for buying the house. In the circumstances this money belongs to me."

On January 30, 1935, Messrs. Rutter & Co., who were now acting as solicitors for the plaintiff, wrote to the defendant stating that the plaintiff had no intention of releasing the money which the defendant held as his solicitor; that they were instructed that Mr. Joshpe had no right to it; and that the plaintiff objected to the defendant parting with it to anybody but himself.

On November 12, 1935, the plaintiff brought the present action against the defendant, his claim being for the sum of 172*l.* 10*s.*, money had and received by the defendant to the plaintiff's use.

The defendant in his defence stated (inter alia) (para. 2) that the said sum was originally handed by Joshpe to the plaintiff in anticipation of and as a gift conditional upon the marriage of the plaintiff and the daughter of Joshpe and for the purpose, as the plaintiff at all times well knew, of purchasing for them a matrimonial home; (para. 3) that in October, 1934, the engagement came to an end and thereupon the purpose of the gift failed and the condition aforesaid was broken and the moneys became again the property of Joshpe; (para. 4) that Joshpe claimed the said sum from the defendant, and the defendant, upon the direction and authority of Joshpe,

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and well knowing the circumstances in which the sum had been paid by Joshpe to the plaintiff, accounted to Joshpe for the same; and (para. 5) that the defendant relied with the consent and authority of Joshpe upon his claim and right to the said sum.

The plaintiff replied.

On March 5, 1936, the action was tried by MacKinnon J. without a jury.

On behalf of the plaintiff evidence was given by the plaintiff himself, by Mr. Anselm Blaustein, his father, and by Mr. S. Rutter, his solicitor.

On behalf of the defendant evidence was given by the defendant and Mr. Joshpe. It appeared from the evidence of the defendant that when he received the amount of the deposit from the vendor's agents on October 25, 1934, he placed it in the books of his firm to the credit of the private account of the plaintiff; that he took upon himself to refuse to pay it to the plaintiff because he knew that it was Joshpe's money; that in February, 1935, Joshpe told him that he (defendant) could have the money when released; that on March 15, 1935, he transferred the money from the plaintiff's account to his own office account and a private account; that he did that on authority from Joshpe to use the money as his own; that it was the fact that he had treated the money as his own; that he had never credited it in the books to Joshpe, but had "accounted" to Joshpe for the money by treating it in the way he directed; that he had used the money for himself; and that he was defending the action at Joshpe's request. Mr. Joshpe stated that he gave his cheque for 172*l.* 10s. for the deposit on condition of the marriage; that in February, 1935, he told the defendant that as the engagement had been broken off he could keep the amount as a present to himself; and that he had promised to spend about 4000*l.* on a house, furniture and the wedding.

MACKINNON J. This is a curious, and in some respects an interesting case, the decision of which involves hard questions

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of law. [His Lordship stated the facts and the issues arising on the pleadings, and continued as follows :]

The questions are, first, whether as between Joshpe and the plaintiff, Joshpe can assert a claim to this 172*l.* 10*s.* Secondly, if he can do so, whether in this action in its present form the defendant can rely upon that right of Joshpe's, and assert it in defence of the plaintiff's claim in this action. On the first issue it is quite clear to me that as between Joshpe and the plaintiff, Joshpe was entitled to say that he only gave the plaintiff that 172*l.* 10*s.* as a deposit for the price of the house that the plaintiff was going to buy for himself and Joshpe's daughter to live in. It was a gift conditional upon the engagement continuing and their getting married; and when the engagement was broken off he was not then bound to give the plaintiff the 4000*l.* or the rest of the price of the house, and, incidentally, he was entitled to have the advance part of that price of the house paid back.

There remains the question, whether in this action the defendant can rely on that claim of Joshpe as a defence to the claim against him. Prima facie, of course, the defendant was employed as the plaintiff's agent, and he received this 172*l.* 10*s.* in his capacity as the plaintiff's solicitor. Prima facie, therefore, on a claim for the money by the plaintiff against the defendant as his agent and solicitor, the defendant would be bound to pay it to him. Can he, however, say that he is not bound to pay the money to the plaintiff because somebody else has a better title to it, and with the authority and on behalf of that other person he is entitled to set up that claim against the plaintiff's claim? Mr. Wallington has argued that, this being a pure claim for money had and received, any such assertion of jus tertii by somebody else is unavailing. He agrees that it would have been possible in this case for the defendant to come to the Court and ask to interplead asserting that the plaintiff was asking for the money and Joshpe was asking for the money, and that on such an application he would be entitled to pay the money into Court and leave Joshpe and Blaustein to fight out their own respective rights in the matter. But as that has not been

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done Mr. Wallington says that the defendant is unable, and is legally disentitled, to set up this defence to the present writ in order to rebut this claim of the plaintiff. This, says Mr. Wallington, is a claim for debt. He agrees that, if the plaintiff were claiming goods from the defendant in trover the defendant might say in answer to that claim that though he received these goods as the plaintiff's agent they were not really the plaintiff's goods, as they had been claimed from the defendant by a third party, and that at the request and on behalf of that third party the defendant set up his claim against the claim of the plaintiff. That claim for goods in trover or conversion it is admitted would be a legitimate form of defence. But as this is not a claim for goods but only for money, a mere claim in debt, Mr. Wallington suggests that such a form of defence is not available. The basis of that suggestion was the decision in the case of *Biddle* v. *Bond.* (1) In *Biddle* v. *Bond* (1) the question no doubt was as to the title to goods; but the real truth is that the claim in that case was for money had and received. The defendant there had received certain goods as the agent for the plaintiff, and he sold those goods and was in possession of the proceeds of the sale, and the claim upon him was for that amount. Prima facie he had no defence to such a claim; but he set up the fact that the goods which he had sold did not really belong to the plaintiff but belonged to a man named Robbins who had made a claim on him for them; and he was relying upon the right of Robbins, by the authority of Robbins, as a defence to the claim for the money, the proceeds of the sale of the goods. There it was held that the defendant might set up the jus tertii of Robbins as an answer to the action.

In the same way in this case, to the plaintiff's claim for money had and received I think the defendant is entitled to set up the defence that as between him and the plaintiff he is entitled to this money, inasmuch as the money belongs to Joshpe, who has called upon him, the defendant, not to let the plaintiff have it, and, as is pleaded, that the defendant relied on the consent and authority of Joshpe in his claim for the sum.

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(1) (1865) 6 B. & S. 225; 34 L. J. (Q. B.) 137.

The result is that I think this claim fails for that reason and must be dismissed with costs.

The plaintiff appealed. The appeal was heard on January 26, 27, 1937.

Wallington K.C. and *F. W. Wallace* for the plaintiff, appellant. MacKinnon J. was wrong in holding that the plaintiff is not entitled to recover from the defendant the sum of 172*l.* 10*s.*, the amount of the repaid deposit on the price of the leasehold house. The plaintiff employed the defendant to act as his solicitor in the negotiations for the intended sale of the house by the vendor to the plaintiff, and, when these were discontinued, to recover for him the deposit that had been paid on the price. In these circumstances, when the deposit was repaid to the defendant it was money had and received by him to the use of the plaintiff, whose solicitor and agent he was, and he had no authority to pay the amount to Joshpe, Maltz, or any one else.

Cartwright Sharp K.C. and *H. V. Lloyd-Jones* for the defendant, respondent. The decision of MacKinnon J. that the plaintiff is not entitled to recover the sum which he claims, was right. The present case is covered by the case of *Biddle* v. *Bond*. (1) In that case, where a bailor, who had wrongfully seized goods belonging to another person, delivered them to the bailee to be sold, and sued the bailee for the proceeds of sale of the goods, it was held that the bailee might set up the jus tertii of the true owner of the goods as a defence to the action. The doctrine of that case is not limited to an action by a bailor to recover the chattel bailed or the proceeds of its sale, but extends to an action by a principal against his agent for money had and received by the latter to the use of the former; and, consequently, here the defendant is entitled to set up against the plaintiff's claim for the amount of the repaid deposit the right and title of Joshpe to the money. The case of *Biddle* v. *Bond* (1) was itself an action for money had and received by the defendant to the use of the plaintiff. The goods which the plaintiff had bailed with the defendant had been sold and only the proceeds of sale remained in the hands of the defendant. That case has, therefore, a closer analogy to the present case than if it had been a mere case of bailment. But whether an action be for goods or for money, it is submitted that that case shows that the defendant is equally entitled to rely by way of defence upon the jus tertii of the true owner of the property. The defendant has set up the defence of the jus tertii of Joshpe by his instructions and with his consent. It is immaterial that before the action was brought Joshpe had given the money claimed to another person, and it is no less immaterial that the person to whom he gave it happened to be the defendant. In claiming the money for himself the defendant must rely upon the title of Joshpe. In asserting his own right he is asserting the title of Joshpe also. The plaintiff cannot put himself in any better position by delaying to bring his action until after the person having the jus tertii has exercised that right by disposing of the property. The gift of the money by Joshpe to the plaintiff was made on condition that the marriage should take place, and when the condition failed the plaintiff became a bare trustee of the money for Joshpe and bound in good faith to return it to Joshpe, who had a right to follow it into the hands of the plaintiff or of any one who held it on behalf of the plaintiff.

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(1) 6 B. & S. 225.

Wallington K.C. was not called upon to reply.

SLESSER L.J. In this case the plaintiff, Mr. Leonard Blaustein, brought an action to recover the sum of 172*l.* 10*s.* as being "money had and received by the defendant to the plaintiff's use." The circumstances of the case are rather unusual, and the facts as they appear from the evidence need some recitation in order that they may be fully understood. [His Lordship stated the facts at length substantially as above set out, and continued as follows:]

In this case we have to consider what possible answer the defendant can have to a claim of the simplest kind.

The plaintiff employed the defendant as his solicitor and agent in the intended purchase of a house. The purchase was not proceeded with and the deposit of 172*l.* 10*s.* was repaid by the vendor to the defendant. The plaintiff says that the defendant admittedly received those moneys as his agent, and according to the recognized principles of law, is now bound to account to him for the moneys which he holds as the plaintiff's agent for the plaintiff's use, and that he is estopped from saying anything to the contrary.

The defence, which was argued before MacKinnon J., and which found favour with the learned judge, as I understand his judgment, was of a rather unusual kind. Advantage was taken of a line of authority which began, or at any rate was recognized, as early as the reign of Queen Elizabeth in *Shelbury* v. *Scotsford* (1), and finds a very clear expression in the case of *Biddle* v. *Bond* (2), where the headnote shows that the estoppel against a bailee from disputing the title of his bailor, and setting up a jus tertii, may cease when it is shown, first, that the person claiming the jus tertii has a title paramount to the goods; and, secondly, when the bailee disputes the claim of the bailor with the authority of the third person. As was said in *Thorne* v. *Tilbury and Others* (3), the matter must be with the title and authority of the third party, and that case is referred to in *Biddle* v. *Bond.* (2)

In the present case I think that there are two fatal objections to applying the principle which was relied upon in *Biddle* v. *Bond.* (2) First, I am clearly of opinion that the case of *Biddle* v. *Bond* (2), following *Shelbury* v. *Scotsford* (4) and the other authorities mentioned in and following *Biddle* v. *Bond* (2), are all cases dealing with the right to property, such as goods and chattels which are the subject of bailment and the like. *Biddle* v. *Bond* (2) was itself a case against a bailee. It was concerned with the alleged wrongful dealing with chattels, and I cannot find in any of the books the slightest reason to suppose that its principle should be extended to the claiming of a sum of money due on an account, as in the present case.

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(1) (1602) Yelv. 22, 23.
(2) 6 B. & S. 225.
(3) (1858) 3 H. & N. 534.
(4) Yelv. 22.

Mr. Cartwright Sharp has contended, and it is an argument which apparently the learned judge accepted in the Court below, that *Biddle* v. *Bond* (1) is not limited to chattels, but is capable of a much greater extension; that the declaration in that case shows that the claim was in debt and, therefore, was for money; and that for that reason the question of bailment only arose indirectly. He said that the title of a third party to an account can similarly be sustained under that authority. With every respect to Mr. Cartwright Sharp's argument, and to the learned judge, I have come to an entirely different conclusion. As I have indicated, there is a second reason why *Biddle* v. *Bond* (1) does not apply to the present case. It is true that in that case, the declaration having set out that the defendant had promised to sell and dispose of the goods of the plaintiff, on the request to render to the plaintiff a true account of the sale and of the moneys arising from such a sale and to pay over such moneys to the plaintiff, to that extent the action was rightly framed in debt. It may be that in a particular action debt and not trover is the proper method of testing the question, not of the title to the goods but of the title to moneys arising from the sale of the goods. But in that case the debt arose from the wrongful dealing with the goods. In order that the principle of jus tertii may arise, there must, it would seem, be a wrongful dealing with the goods. The whole principle is based upon title paramount in bailment. As a matter of fact, though the cases do not appear to have been cited to the learned judge in the Court below, there is authority to the effect that where an agent would otherwise be bound to account to his principal in respect of moneys paid to him, he cannot resist the claim of his principal by alleging some claim made to the moneys by some other person. I am speaking now not of chattels but of moneys received by the agent on the principal's behalf, which must be paid over or accounted for to him. There are two

(1) 6 B. & S. 225.

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authorities which I wish to mention in this connection. The first is *Roberts* v. *Ogilby and Another.* (1) In that case the plaintiff brought an "action of assumpsit against his insurance brokers, to recover from them the amount of a total loss received by them from the underwriters. The declaration was for money had and received, and consisted merely of the common counts. The defendants pleaded the general issue, and a set off." It appears from the evidence that the defendants effected an insurance of a certain ship, and that the insurance was to be sent to the plaintiff. There was a loss, and moneys became due. The defendants received the sum insured from the underwriters. The plaintiffs then asked whether they might recover their money. The defence was set up that there were interests in third parties against the claim and title of the principal. In the course of his judgment Richards C.B. said (2): "It is clear that Roberts the plaintiff, through the medium of Evans, contracted with the defendants: and they knew that Evans acted for Roberts, and Roberts was the only party contracting with them. It appears from the letter of the defendants, dated the 1st of May, that they knew (how they knew it does not appear) that Roberts, by the letter containing the order of the captain, authorised them to insure the ship for himself only; and they disclaim all agency for any other person. They, following his directions, insured the ship as his agent, and they received the money from the underwriters as his agent. It is true, the plaintiff writes a letter, wherein he says, that he ordered the insurance on the share of other persons, the Welch owners; but that was clearly the first intimation the defendants had, that there were any other persons connected with Roberts in the adventure, and that he was not owner of the whole. That they themselves expressly state, in the postscript to their letter, in answer to that of the plaintiff. They would undoubtedly, as they state, have been entitled to recover the premiums from Roberts, and from him only; and that would be sufficient to give him a right to recover on his own sole account in this action against them, on the ground

(1) 9 Price, 269.

(2) Ibid. 281.

of mutuality of liability. It was urged that all the owners might still bring an action against the defendants, notwithstanding this verdict. I think they cannot; for there is no privity between other persons and these defendants. There is nothing out of which the other owners could make a case against them, whatever they might do against Roberts. It now appears, indeed, that the plaintiff considered the defendants agents of others as well as himself; but that was not known to the defendants at the time when they effected the insurance, and they have since in fact disclaimed such agency in terms. The plaintiff alone employed the defendants; and they, as his agents, having since received the money from the underwriters, must be held to have received it for his use, and are therefore liable to him for the amount." The other learned judges speak to the same effect. It will be noticed that in that case no suggestion of any such principle as is laid down in the case of *Biddle* v. *Bond* (1) or other earlier cases is to be found.

The other case, which I do not propose to discuss in detail, is *Dixon* v. *Hamond*. (2) The headnote says: "An agent cannot dispute the title of his principal; and therefore where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight and charged them with the premiums, etc.; and, on a loss happening, received the money from the underwriters: Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged." Abbott C.J. there said (3): "Here the defendant has received the money as agent for the partnership, and he cannot now be permitted to say, that he received it for the benefit of Flowerden alone. All the rest of the world, except the defendant, might dispute the legal title of the plaintiffs to the ship, but he cannot do it."

With regard to the other matter, namely, that, at the

(1) 6 B. & S. 225.
(2) 2 B. & Ald. 310.
(3) Ibid. 313.

time of the action brought, such proportion as Mr. Joshpe might claim of this 172*l.* 10*s.* had already been transferred to the defendant, I have mentioned the case of *Thorne* v. *Tilbury* (1), which is referred to in *Biddle* v. *Bond* (2), and is to the effect, as Pollock C.B. said in *Biddle* v. *Bond* (2), that "a bailee can set up the title of another only 'if he defends upon the right of title, and by the authority of' that person."

For the reason which I have stated, it is quite impossible to apply here the principle of *Biddle* v. *Bond.* (2) If it could be applied, I cannot understand how it could be said that Mr. Joshpe could give right title and authority to the defendant Maltz to set up as his agent, when Mr. Joshpe stated before the action brought that he had given the money to Maltz himself. Obviously, the only possible title which could interest him at the time of action was the title of Maltz. In my opinion, Maltz has no title whatever to this 172*l.* 10*s.* I think, when properly considered, this is simply a case of principal and agent. I have given judgment at some length because I have had the misfortune to differ from the judgment of MacKinnon J. I think that this appeal should be allowed.

SCOTT L.J. I agree. There are two questions in this case. The first is whether *Biddle* v. *Bond* (2) applies to this case; and the second is, if it does not apply, what is the position which results? The facts in this case, as I understand them, are simply these. [His Lordship stated the facts and continued:] To these facts *Biddle* v. *Bond* (2), in my view, has no application whatever. The defence which is set up is that under the principle of *Biddle* v. *Bond* (2) the defendant became entitled as of right to refuse to hand over to his own client the money which he had collected for his client and held in his own banking account. *Biddle* v. *Bond* (2) is a case which depends entirely upon the law of bailment. I am inclined to think that it is a particular application of a general rule that possession gives the possessor a good title against all the world except the true owner. *Biddle* v. *Bond* (1) decided one point only. That point was that, where there is a bailment and the bailor sues the bailee to recover the goods, or if they have been turned into money their proceeds, the bailee may, if the facts warrant it, say: " I am refusing to give these goods or the proceeds of them to you because they are not yours, but belong to a third person and, on his authority and on his instructions, I am holding them for him." In this particular case, as my Lord has said, even assuming—to make an erroneous legal presumption—that *Biddle* v. *Bond* (1) has any relevance at all, that answer would not be available to the defendant. He is not in a position to say that he is defending in jure tertii, because, after he transferred the item to his own account, in accordance with what he said Mr. Joshpe told him he might do, he would be defending not Mr. Joshpe's right but his own right. Further than that, there is no such instruction by Mr. Joshpe to him as would constitute an authority from the true owner within the meaning of *Biddle* v. *Bond*. (1)

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(1) 3 H. & N. 534.

(2) 6 B. & S. 225.

The right view of the facts, putting aside *Biddle* v. *Bond* (1) as inapplicable, is, I think, that the relations of the parties were merely those of debtor and creditor and that questions of accounting only are those which we have to consider. I assume that, when the marriage fell through, the plaintiff became indebted to Mr. Joshpe on the ground that the 172*l.* 10*s.* had been a gift on condition—namely, that the marriage went through. When the condition failed, a debt arose and Mr. Joshpe might have been entitled to sue, and to-day is possibly entitled to sue, the plaintiff for this 172*l.* 10*s.*, the money which he had received. The plaintiff did not hand over Mr. Joshpe's cheque to the estate agents of the vendors of the house which he was proposing to buy. He drew a cheque himself on his own banking account and sent it direct to the agents. When the marriage fell through he instructed the defendant, his own solicitor, to get back the deposit on his behalf. The defendant was under an obligation to get it back and he did get it back. Having received the money,

(1) 6 B. & S. 225.

he was under an obligation to his client, an ordinary obligation as his agent and solicitor, to hand over the money to his client. In such circumstances no question of jus tertii can arise. The only relationship between the plaintiff and the defendant is that of client and solicitor, creditor and debtor. It may be that the defendant as solicitor was, in addition, under a fiduciary duty to account to the plaintiff for the money. I think he was; but in any case no direction or authority from Mr. Joshpe could entitle the defendant to refuse to pay over the money to the plaintiff. The law is perfectly clear that an agent receiving money rightfully for his principal is not liable in respect of that money to the owner of the money even where the principal, upon receiving it, would be bound to pay it over to the owner. *Stephens* v. *Badcock* (1) is an authority for that proposition. It would be no defence to an action for account by a client against a solicitor for the solicitor to say: " As against you, the third party says that he has a good claim in debt for an identical sum and he has asked me to pay to him direct so as to save him the trouble of suing you." That is what the respondent here is submitting that we ought to say is the law. In my view it is not the law. Here there is no defence to the claim in debt by the client against the solicitor to hand over money collected for the client, which he is bound to hand over on demand.

FARWELL J. I agree. As we are differing from the learned judge of the Court below, I desire to say a very few words on the matter. The action is an action by the plaintiff against the defendant for money had and received, the defendant having received the money as agent and solicitor for the plaintiff. The defence claims that the defendant was entitled to set up a jus tertii—namely, that a third person, Mr. Joshpe, had a good title to the money, and that afforded to the defendant a good defence to the action. MacKinnon J. accepted that view and decided against the plaintiff on the authority of the case of *Biddle* v.

(1) 3 B. & Ad. 354.

Bond. (1) As I understand the judgment of the learned judge below, that was the only ground upon which his judgment was founded.

With regard to *Biddle* v. *Bond* (1) it is necessary to see what the facts in that case were in order to appreciate the judgment. The goods in question were the goods of one Robbins. They had been seized by the plaintiff and by him delivered to the defendant Bond, with orders from the plaintiff to sell those goods and to retain the proceeds for the plaintiff. Before the sale took place, while the chattels were still in the hands of the defendant, the true owner, Robbins, gave notice to the defendant that the goods were his, that he, therefore, had a good title to them and that the defendant must retain them for him, the third party. That notice was given at the last moment on the eve of the sale. The sale proceeded, and instead of the goods, the defendant had in his hands the money representing the goods. The whole case proceeded upon the footing that the mere fact that the chattels had been turned into money did not affect the right of the defendant to say, as a defence to this action, that he was a bailee of the goods and entitled as such to set up the title of the true owner.

In my judgment that case is no authority for the proposition that, in a money claim in which the principal is calling upon his agent to account, the agent is entitled to set up a jus tertii. *Biddle* v. *Bond* (1) was a case of bailment and nothing more, and in my judgment it is no authority to support the defendant in a case of this kind.

Appeal allowed.

Solicitors for appellant: *S. Rutter & Co.*
Solicitors for respondent: *Maltz, Mitchell & Co.*

J. R.

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(1) 6 B. & S. 225.

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Feb. 12, 15.

BERG *v.* SADLER AND MOORE.

Contract—Contract procured by plaintiff by false pretences—Payment for goods by plaintiff—Refusal by vendor to deliver goods or return purchase-money—Action for money had and received—Refusal of Court to assist plaintiff—Ex turpi causa non oritur actio.

The plaintiff, who was formerly a member of a tobacco association but had been placed on its stop-list for breach of its rules and was therefore unable to obtain supplies of cigarettes from any of its members, arranged with R., who was a member of the association, that R. should order in his own name from the defendants, who were wholesale members of the association, a supply of cigarettes which the plaintiff required. Accordingly R. having ordered the cigarettes, S., one of the plaintiff's assistants, accompanied by one of R.'s representatives, attended at defendants' premises to receive the cigarettes and to pay the money for them. S. paid the money, but the defendants having doubts as to the bona fides of the transaction refused either to deliver the cigarettes or return the purchase-money. The plaintiff thereupon brought the present action for the recovery of the money. Macnaghten J., by whom the action was tried, dismissed it on the ground that the plaintiff had been guilty of an attempt to obtain goods by false pretences and that the Court would not assist him to recover the money. On appeal:—

Held, that to succeed in his action for money had and received the plaintiff must prove the exact circumstances in which the money was paid and the circumstances which he said entitled him on ground of justice to have an order for repayment; that if he proceeded to that proof he could only establish his claim by proving facts which showed that he was engaged in a criminal attempt to obtain goods by false pretences; and that the Court on well-established principles would refuse to give its aid to any claim which could only be established by proving facts of that nature.

Simpson v. *Bloss* (1816) 7 Taunt. 246; *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742 and *Alexander* v. *Rayson* [1936] 1 K. B. 169 applied.

Decision of Macnaghten J. affirmed.

APPEAL from a decision of Macnaghten J.

The action was brought by the plaintiff Berg to recover a sum of money paid by him to the defendants Sadler and Moore for certain goods which they refused to deliver and the purchase-money for which they refused to return. The

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defendants based their refusal on the ground that plaintiff's scheme was an attempt to obtain the goods by false pretences.

The circumstances which gave rise to the claim were these: There was a body called the Tobacco Trade Association, the members of which were either manufacturers or traders. The object of the Association was to prevent what is called "price-cutting" and to secure price maintenance. The traders agreed in return for their being supplied by the manufacturers with the particular goods, namely, tobacco, cigarettes and snuff, which came within the category of price-maintained goods, that they would not sell at less than the prices fixed for those goods.

In January, 1934, the plaintiff became a member of the Association, but in April of the same year it was discovered that he was breaking the terms of the agreement, and thereupon he became what was called a "cut-price retailer" and was put on the list of retailers to whom manufacturer members of the Association would not supply goods. He carried on a hairdresser's business, but he apparently did a considerable amount of selling of cigarettes and other classes of tobacco goods.

In or about August, 1935, the plaintiff came into contact with one Reece, who was a member of the Association and in full enjoyment of its privileges. The plaintiff obtained from Reece a large supply of cigarettes which were sold by the defendants, who were also members of the Association, as they thought, to Reece. The transaction, as carried through, involved the plaintiff paying the price of 134*l.* in cash, and the plaintiff's wife and Reece together going with the cash to the defendants and carrying off the cigarettes. The plaintiff paid to Reece a commission or profit of 5*l.*

Towards the end of the same month it was contemplated that the proceedings should be repeated, and Reece gave a written order to the defendants for 39,500 cigarettes at a price of 72*l.* 10*s.* The defendants received the order on the footing that they were supplying Reece, but what really happened was, as Macnaghten J. found as a fact, that the whole transaction was simply a scheme by which, through

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the intermediation and under cover of Reece, the plaintiff was to get from the defendants a supply of cigarettes. The defendants would not have supplied the plaintiff with cigarettes had they known that he was the purchaser. It was necessary, therefore, so to arrange the transaction that the defendants would be deceived into supplying the cigarettes and would believe that they were supplying them to Reece, whereas in fact they were supplying them to the plaintiff. The plaintiff therefore sent one Schlisser, one of his assistants in the hairdressing business, accompanied by a representative of Reece, to the defendants with 70*l.* to collect the cigarettes. Some little difficulty arose because the price was 72*l.* 19*s.*, and the defendants refused to hand over the cigarettes until they were paid the extra 2*l.* 19*s.* Schlisser therefore had to go back to the plaintiff to get another 3*l.*, and then, having got it, he paid it and obtained a receipt and the 1*s.* change. The defendant Moore, who was the member of the defendants' firm concerned in the matter, had some doubt or suspicion, and when he handed over the receipt he said he would send the goods to Reece's place of business. Schlisser immediately said that that would not do, and demanded the money back. Moore then said that this was an attempt to get the goods from him by false pretences, and refused to give back the money which had been paid to him, and eventually the writ in this action was issued by the plaintiff claiming a return of the money.

At the trial Macnaghten J. held that the plaintiff had attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants which would have been an action to their grave injury. If in fact they had supplied goods to plaintiff, he being on the "stop-list" the consequences to them might have been of a very serious character in their business. It seemed to him that it was a plain case where there had been an attempt to obtain goods by false pretences, and that it was nothing to the purpose that the fraudulent person who was attempting that crime was in fact willing to pay the full price of the goods. The learned judge then came to the conclusion that the Court would not entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law and he accordingly dismissed the action.

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The plaintiff appealed. The appeal was heard on February 12 and 15, 1937.

W. H. Cartwright Sharp K.C. and *H. Glyn-Jones* for the appellant. There is here no evidence, it is submitted, of obtaining goods by false pretences. The cigarettes were ordered by Reece, who was entitled to obtain them from the defendants. There was no false pretence in the plaintiff sending down the money and paying it on behalf of Reece. What is complained of by the defendants is that the plaintiff failed to disclose the ultimate destination of the cigarettes. But the plaintiff owed no duty to the defendants to tell them who he was. He was perfectly entitled to take advantage of the breach of contract by Reece with the Association. But assuming there was a false pretence, the defendants are not entitled to retain the money. In *Taylor* v. *Bowers* (1) Mellish L.J. said: "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." That applies to the present case. Here the illegal purpose has not been carried out. The cigarettes have not been delivered and the plaintiff is therefore entitled to recover back the money. That that case is good law is shown by *Hermann* v. *Charlesworth.* (2)

[They also referred to *Simpson* v. *Bloss* (3); *Bickerton* v. *Burrell* (4); *Kearley* v. *Thomson* (5); *Feret* v. *Hill.* (6)]

Sir Walter Monckton K.C. and *B. L. A. O'Malley* for the respondents.

[LORD WRIGHT M.R. What is your best case?]

Alexander v. *Rayson.* (7)

(1) (1876) 1 Q. B. D. 291, 300.
(2) [1905] 2 K. B. 123, 134.
(3) 7 Taunt. 246.
(4) (1816) 5 M. & S. 383.
(5) 24 Q. B. D. 742, 746.
(6) (1854) 15 C. B. 207.
(7) [1936] 1 K. B. 169, 182, 187.

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[They were stopped.]

LORD WRIGHT M.R. This case has been very fully put before the Court, but notwithstanding Mr. Cartwright Sharp's argument, I am not able to differ from the conclusion arrived at by the learned judge.

The case in some respects is peculiar, and in some respects involves a novel application of the well known rule which is sometimes expressed in the maxim "ex turpi causa non oritur actio." This, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities. Our business here is to apply these rules, either precisely according to the decisions which have been given, or following those decisions very closely and acting on the analogy of those decisions.

The facts here can be very shortly stated. [His Lordship stated the facts substantially as above set out and read the findings of Macnaghten J. He continued:] This case, as I have said, is in some respects peculiar, and is in some respects to be distinguished from other cases which have been before the Court and in which the Court has refused to entertain the action on the ground of the illegality or immorality which was involved in the proceedings. I need not refer to a common type of case where an action is brought upon a contract and the Court refuses to entertain the action on the ground that, either by express terms or by the understanding of the parties, the contract was intended for the fulfilment of unlawful or immoral purposes. That is the case of *Pearce* v. *Brooks* (1), for instance, and a similar case is *Scott* v. *Brown, Doering, McNab & Co.* (2) This case, I think, presents its own characteristic features. The plaintiff paid over a sum of money to the defendants, intending the property in that money to pass to them. The defendants took the money intending that the property in it should vest in them, and that

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(1) (1866) L. R. 1 Ex. 213.

(2) [1892] 2 Q. B. 724.

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it should be paid in pursuance of a contract of sale to Reece. Up to that point the transaction would have been perfectly binding, the money being vested in the defendants. The plaintiff now demands the repayment of that money. He can only do that on the ground that he is entitled to sue for it in an action for money had and received, and that it is contrary to what is æquum et bonum for the defendants to retain it. To maintain an action for money had and received he has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment. If, however, he proceeds to that proof he can only establish his claim by proving facts which show that he was engaged in a criminal attempt to obtain goods by false pretences. The Court on well-established principles will refuse to give its aid to any claim which can only be established by proving facts of that nature.

For the general proposition which I have just stated I need only refer to two cases. The first is *Simpson* v. *Bloss* (1), which was an action for money had and received. The plaintiff had laid an illegal wager with a third party. The defendant had assumed a part of the bet. The plaintiff won. The third party was the one to pay the debt, but the defendant, as he was going on a journey, asked the plaintiff to advance him his share of the winnings. The third party, however, died insolvent without paying his debt, and the plaintiff sought to recover the amount of his advance from the defendant as money had and received. The Court held that the action must fail. Gibbs C.J. said (2): "How can he"—that is the plaintiff—"make out his claim, but by going into proof of the illegal transaction on account of which it is paid? He says, the payment was on a condition which has failed; but that condition was, that Brograve, who was concerned with the plaintiff and defendant in this illegal transaction, should make good his part by paying the whole bet to the plaintiff; and it is impossible to prove the failure of this condition, without going into the illegal contract, in which all the parties were equally concerned." The present case

(1) 7 Taunt. 246. (2) Ibid. 250.

falls, I think, within that general principle, although it is a somewhat different application of it. The illegality here which necessarily must appear when the plaintiff sets out the facts on which he bases his claim is his own illegality in attempting to commit a misdemeanour under the criminal law. The principle, I think, is the same.

The principle is very clearly stated by Fry L.J. in *Kearley* v. *Thomson*. (1) That case involved a further question—namely, whether the contract had or had not been carried into effect. It was held that it had been partially carried into effect, and that was enough to prevent the plaintiff from succeeding. Fry L.J. in stating the general principle (2) first pointed out that the agreement which was in question was unlawful as interfering with the course of justice, and then said: " As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case the usual rule is potior est conditio possidentis. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the 40*l*. cannot recover it back without showing the contract upon which it was paid, and when he shows that he shows an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins* v. *Blantern* (3), where the Lord Chief Justice says: ' Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back.' " Fry L.J. went on to distinguish *Taylor* v. *Bowers* (4), where recovery was allowed, as I understand the decision, on the ground that the illegal purpose had been abandoned, and that the plaintiff had so repented that he was not debarred from recovering what he had paid.

(1) 24 Q. B. D. 742.

(2) Ibid. 745.

(3) (1767) 2 Wils. 341, 350; 1 Sm. L. C., 13th ed., 406.

(4) 1 Q. B. D. 291.

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Some such argument was put forward in this case, but I should like to add to the expression of opinion of Fry L.J. on that point the observations which are contained in a judgment of this Court by Romer L.J. in *Alexander* v. *Rayson* (1): " Plaintiff's counsel further contended that inasmuch as the plaintiff had failed in his attempted fraud, and could therefore no longer use the documents for an illegal purpose, he was now entitled to sue upon them." (In the case before us the plaintiff had failed to obtain his cigarettes.) " The law, it was said, would allow to the plaintiff a locus pœnitentiæ. So, perhaps, it would have done, had the plaintiff repented before attempting to carry his fraud into effect : see *Taylor* v. *Bowers*. (2) But, as it is, the plaintiff's repentance came too late—namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no locus pœnitentiæ ; see Salmond and Winfield's Law of Contract, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose." That passage seems to apply very fully to the present case.

Alexander v. *Rayson* (3) also illustrates a further principle which I think is applicable to the facts before this Court. In that case an action was brought on a lease against the defendant, who was the tenant holding under it. It appeared in the proceedings that the lease was at a sum of 450*l.* a year, and that it was accompanied by a further and separate agreement under which the lessee was to pay a further 750*l.* a year ostensibly for the performance of various services in connection with the letting. The Court was of the opinion that the true value of the leasehold interest was 1200*l.* a year, and that that sum was split up into these two figures of 450*l.* and 750*l.* a year in order to deceive the assessment committee. In that action, which was brought by the lessor against the lessee, the lessee being entirely ignorant of and unconcerned in this fraudulent attempt, it was held that the Court would

(1) [1936] 1 K. B. 169, 190.
(2) 1 Q. B. D. 291.
(3) [1936] 1 K. B. 169.

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not on the facts as ascertained give effect to the lease, because they held it to have been concocted in the form in which it was in order to effect an unlawful purpose.

Applying that principle to the somewhat different facts of the present case, I think that the 72*l.* 19*s.* here may be regarded as the instrument which the plaintiff was using to carry out his unlawful purpose of obtaining the goods by false pretences. Just as the Court in *Alexander* v. *Rayson* (1) would not allow the lease to be used as an effective instrument, and would not give any remedy in respect of the lease when once it was established that it was created in order to effect a fraudulent purpose, so I think the Court here should refuse to give any remedy in respect of the 72*l.* 19*s.* when once it is satisfied, as it is satisfied here, that the 72*l.* 19*s.* was used, as it was, in an attempt to effect a fraudulent purpose and was the instrument employed in that attempt. The defendants' position, therefore, is that they are in possession of the money which has passed to them under a contract prima facie lawful, but which has turned out to be a contract tainted by fraud, so far as the plaintiff is concerned. The defendants can accordingly rely on the principle "potior est conditio possidentis," and the Court will refuse to reopen the transaction or order the money to be repaid on the ground of a failure of consideration.

I will only mention one of the other cases to which we have been referred, *Gordon* v. *Chief Commissioner of Metropolitan Police* (2), where the question was quite different. The only objection which was raised against the recovery of the money claimed was that, at some earlier period, and in the course of transactions entirely irrelevant to the matter in question, it had been obtained by unlawful gaming. It was held that that was too remote. Buckley L.J. said (3): "It is certainly the law that the Court will refuse to enforce an illegal contract or obligations arising out of an illegal contract, and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause

(1) [1936] 1 K. B. 169.
(2) [1910] 2 K. B. 1080.
(3) Ibid. 1098.

of action without relying upon an illegal transaction must fail: and none the less is this true if the defendant does not rely upon the illegality. If the Court learns of the illegality, it will refuse to lend its aid. The rule is founded not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant, by setting it up as a defence. It is founded on public policy. Lord Mansfield in *Holman* v. *Johnson* (1) said 'Ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'" Buckley L.J. then pointed out that no such consideration arose in that case. It therefore was not one which in any way affects the conclusion at which I have arrived. In my opinion, the appeal should be dismissed, with costs.

ROMER L.J. I entirely agree. Once the facts of this case are understood, it is abundantly plain that no Court in this country would lift a finger to help the plaintiff to recover from the defendants the money which the plaintiff paid to them. The money was paid by the plaintiff to the defendants in the course and for the purposes of an attempt on the part of the plaintiff to defraud the defendants. The fact that, owing to the vigilance of the defendants, the attempt was frustrated is, in my opinion, wholly immaterial.

SCOTT L.J. I agree that this appeal should be dismissed with costs. It is no doubt open to this Court to reconsider the details of the evidence before the judge in the Court below if there be any reason to suppose that he has drawn wrong inferences or applied wrong principles, but I see no reason for criticizing his conclusions of fact. He saw the witnesses, he came to a perfectly definite opinion about them, and found as a fact that the money was paid for a dishonest purpose. He thereupon said: "I have no hesitation in saying that in this case Mr. Berg attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants, Messrs. Sadler & Moore, which would have been an action to their grave injury. If in fact they had supplied goods to Mr. Berg, he being on the 'stop-list,' the consequences to them might have been of a very serious character in their business. It seems to me that it is a plain case of an attempt to obtain goods by false pretences, and it is nothing to the purpose to say that the fraudulent person who was attempting to commit that crime was in fact willing to pay to the persons he was attempting to defraud the full price of the goods. Now those being the facts as I find them to be, the question arises, Can Mr. Berg in those circumstances, having paid this money with the intention of obtaining goods by this false pretence, now maintain an action in this Court to recover the money? No case has been cited to me where the Court has ever entertained any such action. If dishonest people pay money for a dishonest purpose, and then, by good fortune the offence which they designed to commit is not committed, are they entitled in this Court to come and ask for recovery of the money? In my opinion they are not. It would be a bad example if this Court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the Court an order that the money should be repaid." I entirely agree with that judgment, and adopt it as my own.

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(1) (1775) 1 Cowp. 341, at p. 343.

At the same time I agree with what the Master of the Rolls has said, that the facts of this case involve a slightly new application of the rule, but "ubi eadem ratio ibi idem jus." The principle which forbids the assistance of the Court to a plaintiff who asks it in order to effect a dishonest purpose extends, in my opinion, to the case of a request for the Court's assistance in order to extricate himself from a pecuniary difficulty in which he has placed himself by an incomplete performance of a dishonest course of action. Here the plaintiff made a contract of purchase from the defendants by fraudulently inducing them to believe that somebody else was the purchaser. On their suspicions being aroused, after the purchase price had been paid, the defendants refused delivery of the goods. How does the plaintiff thereupon

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frame his action? He says he claims for money had and received upon the total failure of consideration of his contract. The contract was, however, fraudulently induced. In my opinion, he is inevitably invoking the assistance of the Court to enforce that illegal contract when he frames his claim in that way, and the maxim applies. Any other judgment would be contrary to the basic principles of justice.

Appeal dismissed.

Solicitors for appellant: *Lamartine Yates & Morgan.*
Solicitors for respondents: *Russell & Arnholz.*

W. I. C.

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Jan. 21, 22,
26, 27, 28;
March 22.

SAMSON *v.* FRAZIER JELKE AND COMPANY.

[1935. S. 2500.]
[1935. S. 2669.]

Contract—Stock Exchange—Dealings on margin—Failure of client to maintain agreed margin—Right of broker to close account partially in order to provide required margin for balance.

The plaintiff was a speculator on the New York and London stock exchanges. The defendants, who were members of the New York exchange but not of the London exchange, acted for him on margin terms, the London transactions being carried out through brokers who were members of the London stock exchange. The defendants became personally liable to these brokers for the fulfilment of the plaintiff's contracts.

The plaintiff's speculations were unsuccessful and the defendants required him to provide further cover. He failed to do so, and the defendants sold part of his shares to provide cover for the remainder.

Held, that the defendants were entitled, the plaintiff being in default, to close part of the account and carry over the remainder, their only duty being to act in good faith and do what was reasonable in the interests of themselves and their client.

Morten v. *Hilton Gibbes and Smith* (H. L. July 2, 1908, post p. 176*n.*) applied.

Consolidated Actions tried by Hilbery J. without a jury.

The plaintiff, Thomas Edwal Samson, was at all material times a speculator on the New York and London stock exchanges. The defendants, Frazier Jelke & Co., were members of the New York stock exchange, with an office in London, but were not members of the London stock exchange. In their transactions for the plaintiff on the London stock exchange they acted as agents, executing his orders through brokers who were members of that exchange, and sharing the brokers' commission with them. The defendants became personally liable to those brokers for the fulfilment of the contracts entered into for the plaintiff.

Business relations between the parties began in 1934 with dealings on the New York stock exchange. The plaintiff signed a document which the defendants called a loaning authorization in these terms: "In consideration of your acting as brokers for the undersigned, I hereby consent that: All transactions are subject to the by-laws, rules, regulations and customs of the exchange or market (and its clearing house, if any) where executed, and actual deliveries are intended on all purchases and sales. Whenever I am indebted to you and/or have a short position with you, all securities, commodities, and/or contracts for or in relation to securities and/or commodities now or hereafter held by you, or carried by you in any account for me (either individually or jointly with others) or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, repledged, hypothecated or rehypothecated or loaned by you, either to yourselves as brokers or to others, separately or in common with other stocks or securities and either for the sum due to you thereon or for a greater sum. Whenever you shall deem it necessary for your protection to sell any or all of my securities or other property, or dispose of contracts for securities or commodities which are in your possession, or which you may be carrying for me (either individually or jointly with others) or to buy in any securities, commodities, or other property or dispose of any contracts for securities or commodities, of which my account or accounts may be short, in order to close out my account or accounts in part or in whole, such sale or purchase may be made according to your judgment and may be made at your discretion on the exchange or other market where such business is then usually transacted, or at public auction or private sale, without advertising the same and without notice to me and without prior tender, demand, or call of any kind upon me—it being understood that a prior tender, demand or call, or prior notice of the time and place of such sale or purchase, shall not be considered a waiver of your right to buy or sell any securities and/or other property held by you at any time, as hereinbefore provided. Unless otherwise specified by me in writing all statements, demands or notices may be made by mail addressed to me at the above address. This agreement shall continue until revoked by me in writing, such revocation to affect only transactions thereafter entered into between us." That document, as the defendants admitted, was obtained from the plaintiff because it was necessary under the rules of the New York stock exchange. After a number of transactions in American shares the plaintiff extended his operations to the London stock exchange. The terms arranged were that the plaintiff should provide 15 per cent. margin on shares contangoed by the defendants and 25 per cent. on shares which the defendants were unable to contango and which had to be picked up by the brokers.

The plaintiff's speculations were unsuccessful, and in July, 1935, the defendants were calling on him to transfer his account to other brokers or to increase his cover to 50 per cent. The plaintiff refused or neglected to do so and on July 19, 1935, the defendants sold some of his securities to provide cover for the remainder. On August 7, 1935, the defendants sold the remainder of the plaintiff's securities and closed his account.

The plaintiff began these actions claiming damages and an account, alleging (inter alia) the breach of an implied term of his agreement with the defendants that in the event of his being in default the defendants should have the right to close his account by selling all the shares then open, but not by selling some only of the shares to provide cover for the rest.

Serjeant Sullivan K.C., *Reginald Sharpe* and *Charles Butterfield* for the plaintiff. When brokers have the right to close the account of a client in default, they must close it altogether, or not at all. They cannot pick and choose which of the client's shares they will carry over. The decision of A. L. Smith J. in *Samuel* v. *Rowe* (1) to that effect seems to have been endorsed by the Court of Appeal in *Cullum* v. *Hodges* (2), and it purports to lay down a general rule. The House of Lords in *Morten* v. *Hilton Gibbes & Smith* (3) said

(1) (1892) 8 Times L. R. 488.

(2) (1901) 18 Times L. R. 6.

(3) Unreported, July 2, 1908. A report is appended post, p. 176*n*.

that the broker might do what is reasonable, but in this case the reasonable course was to sell the whole. If the brokers by their own wrongful act close the contract they cannot rely on that decision. Here they sold for their own purposes. If they are closing the account, they must sell all the shares included in the account, and they cannot say: "We will not close the account, but will keep as much of it open as we choose, and apply the proceeds of what we do sell, not by transfer to you, but to compel you to make a 50 per cent. margin on what we choose to retain." *Samuel* v. *Rowe* (1) has never been dissented from to the extent of saying that a stockbroker is never bound to sell the whole.

Van den Berg K.C. and *Clive Burt* for the defendants. *Samuel* v. *Rowe* (1) was overruled by the unreported case of *Morten* v. *Hilton Gibbes & Smith* (2), in the House of Lords where it was laid down that the broker may do what is reasonable in his own and his client's interest. In the present case the loaning authorization, though primarily intended for New York, is wide enough to provide express authority for the defendants' course of action.

Cur. adv. vult.

March 22. HILBERY J. read a written judgment, in which after dealing with various issues of fact, and determining them in favour of the defendants, he decided the question of law in these terms:

Serjeant Sullivan urged that the speeches in the House of Lords in *Morten* v. *Hilton Gibbes & Smith* (2) had no application to this case, because the plaintiff was not in any way in default. I think he was, in the several respects I have just indicated, beginning with his failure to provide the 751*l.* cash and ending with his refusal of the necessary instructions to enable the defendants to transfer his shares to another broker on the London stock exchange after the defendants had agreed to pay the costs of the transfer.

The position had become very similar to what it was in the case cited. In that case Lord Loreburn L.C. said: "After the various stocks had been carried over for some months the brokers, who were almost entirely unsecured, grew anxious. I will not narrate at length what passed. Mr. Morten would not close the account, or give security, or even attempt to transfer the account to some other brokers' care. He demanded that the brokers should again carry over the speculative account beyond March, alleging falsely that they had agreed to do so. Mr. Morton Smith could not, of course, justify this claim, that a principal was entitled to speculate at the risk of his agents. In the end, the brokers closed the account in Hudson Bay and Rio Tinto shares on Saturday, March 11. As to the remaining stock, they did make contracts carrying it over in order to oblige Mr. Morten, as they thought. When he repudiated both of these pieces of business, they closed the whole account, and brought this action to recover the differences. I will only further observe that when these things were done the brokers were under a personal liability for the bargains they had made, and were left without any instructions whatever as to what they should do, except the demand that they should continue to incur liability on Mr. Morten's behalf, which, like sensible men, they refused to do. In these circumstances, the appellant's counsel made two points against the brokers' claim for differences. In the first place he urged, that the brokers, although entitled to close the whole account at the proper day in March, were not entitled to close part of it and carry over the remainder. For this proposition, he relied upon the decision of A. L. Smith J. at nisi prius, in *Samuel* v. *Rowe* (1), and a supposed endorsement of that decision by the Court of Appeal in *Cullum* v. *Hodges*. (2) I do not think that the Court of Appeal did endorse it. They mentioned it without disapproving, but did not regard it as applicable to the facts before them. It appears to me quite an untenable proposition to affirm broadly that a broker cannot close part of an account and carry over the remainder when his principal is in default. It must depend upon the circumstances, and I doubt if A. L. Smith J. intended to lay down this sweeping proposition. So far as the present case is concerned, I am not satisfied that the account was one and indivisible. Even if it were, I think the brokers, left without proper instructions, would be entitled to do what was reasonable in their own interests and those of their principal, which were largely identical, and in such a situation as the principal had here created, their action, if in good faith, ought not to be lightly condemned."

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(1) 8 Times L. R. 488.

(2) July 2, 1908. A report is appended post, p. 176*n.*

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(1) 8 Times L. R. 488.

(2) 18 Times L. R. 6.

Those observations and conclusions, in my view, apply here. The defendants sold as they did in good faith. They did what was reasonable in their own interests, and in the interests of their principal, the plaintiff. The way in which they sold was reasonable in the circumstances. They carried out the sales in the way they honestly thought was most to the advantage of their principal and themselves.

Apart from these considerations, I think the defendants are right in their contention that they had full authority to sell as they did under the powers given to them in the loaning authorization of August 28, 1934. It is true that that authority was originally obtained because the plaintiff was proposing to carry out, through the medium of the defendants' firm, transactions on the New York stock exchange, and that the defendants then obtained it from the plaintiff because they were required to do so by the rules of the New York stock exchange. But in terms its scope was not confined to transactions on the New York stock exchange. Indeed it expressly provides that transactions are subject to the by-laws, rules, etc., of the exchange or market where executed, a statement which is hardly consistent with an intention that it should only govern transactions on the New York stock exchange. The defendants, of course, knew they had this authorization from the plaintiff in its general terms, and had the additional safeguards it afforded them, when they agreed to act in the capacity of brokers for the plaintiff in his transactions on the London stock exchange. No stipulation was then made that his transactions on the London stock exchange should not be subject to that authorization. The terms of the authorization known to both parties were wide enough to

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be applicable to transactions on the London stock exchange. In those circumstances, I do not think that the general powers given by the authority can be held to be restricted to transactions on the New York stock exchange. It is not without significance that immediately the plaintiff challenged the defendants' rights to sell, the defendants prayed in aid this authority.

Judgment for defendants.

Solicitors for plaintiff: *Wrentmore & Son, for Phœnix, Levinson & Walters, Cardiff.*

Solicitors for defendants: *Linklaters & Paines.*

J. W. H.

NOTE.

[HOUSE OF LORDS.]

July 2, 1908.

MORTEN *v.* HILTON GIBBES AND SMITH.

The plaintiffs Hilton Gibbes & Smith brought an action on a specially indorsed writ claiming 3764*l.* 16*s.* 10*d.* balance due from the defendant Morten in respect of purchases and sales of stocks and shares by the plaintiffs as stockbrokers. The defendant pleaded (inter alia): "The defendant also contends that even if the plaintiffs were at any time entitled to close his account (which he denies) they were compelled to close the whole of his said account and could not select such parts of it as they chose."

At the trial before Grantham J. and a jury, a verdict was returned for the plaintiffs for the amount claimed. The defendant's appeal was dismissed by the Court of Appeal and he appealed to the House of Lords, who heard the appeal in May, 1908, and took time for consideration.

Morton W. Smith and *H. C. Dickens* for the appellant.

F. Gore-Browne K.C. and *Ernest Pollock* K.C. for the respondents.

1908. July 2. LORD LOREBURN L.C. My Lords, I agree with the conclusions of the Court of Appeal. The defendant, Mr. Morten, employed the plaintiffs as his brokers in a speculative account. Part of the stock which he caused to be sold in anticipation of a fall in its market value consisted of Hudson Bay shares and Rio Tinto shares. After the various stocks had been carried over for some months, the brokers, who were almost entirely unsecured, grew anxious. I will not narrate at length what passed. Mr. Morten would not close the account, or give security, or even attempt to transfer the account to some other brokers' care. He demanded that the brokers should again carry over the speculative account beyond March, alleging falsely that they had agreed to do so. Mr. Morton Smith could not, of course, justify this claim, that a principal was entitled to speculate at the risk of his agents. In the end, the brokers closed the account in Hudson Bay and Rio Tinto shares on Saturday, March 11. As to the remaining stock, they did make contracts carrying it over, in order to oblige Mr. Morten, as they thought. When he repudiated both of these pieces of business, they closed the whole account, and brought this action to recover the differences. I will only further observe that when these things were done the brokers were under a personal liability for the bargains they had made, and were left without any instructions whatever as to what they should do, except the demand that they should continue to incur liability on Mr. Morten's behalf, which, like sensible men, they refused to do. In these circumstances, the appellant's counsel made two points against the brokers' claim for differences. In the first place, he urged that the brokers, although entitled to close the whole account at the proper day in March, were not entitled to close part of it and carry over the remainder. For this proposition he relied upon a decision of A. L. Smith J. at nisi prius in *Samuel* v. *Rowe* (1) and a supposed endorsement of that decision by the Court of Appeal in *Cullum* v. *Hodges*. (2) I do not think that the Court of Appeal did endorse it. They mentioned it without disapproving, but did not regard it as applicable to the facts before them. It appears to me quite an untenable proposition to affirm broadly that a broker cannot close part of an account and carry over the remainder when his principal is in default. It must depend on the circumstances, and I doubt if A. L. Smith J. intended to lay down this sweeping proposition. So far as the present case is concerned, I am not satisfied that the account was one and indivisible. Even if it were, I think the brokers, left without proper instructions, would be entitled to do what was reasonable in their own interests and those of their principal, which were largely identical, and in such a situation as the principal had here created, their action, if in good faith, ought not to be lightly condemned. My only difficulty is that Grantham J. did not leave any question to the jury. But the evidence was all one way, that the course adopted was a reasonable and prudent course. Accordingly, I think we can treat the case, on this part of it, as one in which there was no evidence of substance in support of Mr. Morten's contention. The second point made for the appellant was that the Hudson Bay and Rio Tinto shares ought to have been closed (if at all) on Monday, March 13, instead of Saturday, March 11. We were told that the thirteenth was the carrying-over day. By reason of

(1) (1892) 8 Times L. R. 488. (2) (1901) 18 Times L. R. 6.

the choice of this one day rather than the other, Mr. Morten actually claims that the entire loss on closing this stock must fall on the brokers, though he admits that a very heavy loss would still have been incurred had the stock been closed on the Monday instead of the Saturday. The finding of the jury is conclusive against this argument. They found that the brokers had acted reasonably in the circumstances. They could hardly have found otherwise in face of the uncontradicted evidence that there was in the interests of all concerned much danger in waiting until the Monday. But your Lordships were asked to say that, reasonable or unreasonable, these brokers were bound to wait till Monday, and a case was quoted in support of that view. It does not support it, in my opinion. I think brokers so situated were not only entitled, but bound to carry through the transaction in the reasonable way they honestly thought most to the advantage of their principal and themselves, and that they did so. These considerations dispose of the case.

EARL OF HALSBURY. My Lords, I am of opinion that there was only one question in this case, and that was whether the brokers acted reasonably or not. I think that they did. The jury found that in one respect they did, and I am of opinion that the jury was perfectly right. I concur in the judgment proposed.

LORD ASHBOURNE. My Lords, I concur in the opinion expressed by the Lord Chancellor, and in the motion which he has made.

LORD LOREBURN L.C. Lord Robertson has informed me that he agrees with the judgment which I have delivered.

Appeal dismissed.

J. W. H.

COMMISSIONERS OF INLAND REVENUE *v.* LAWRENCE, GRAHAM & CO.

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Feb. 1, 2, 3;
March 3.

Revenue—Income tax—Reversionary interest—Mortgage—Provision for adding interest in arrear to principal money—Net interest added after deduction of tax—Subsequent sale of reversion by mortgagee—Purchase money less amount left on mortgage paid to mortgagee's solicitors—Payment by them to mortgagee of amount so added to principal money—Claim against solicitors for income tax in respect of this sum—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 21—*Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 26.

By a mortgage and two further charges a mortgagee lent 25,500*l.* on the security of a reversionary interest. Cl. 5 (B) of the mortgage (which also applied to the further charges) provided that in case before the falling into possession of the reversion any interest on the principal money or on any accumulations of interest arising under that provision and added to the principal money should not be paid within thirty days of the due date then the sum due in respect of the half-year's interest so unpaid should become principal money as from the day on which it became due and be added to the principal money and should carry interest at the same rate as that applicable to the principal money, " but so that all interest unpaid on the original principal sum hereby secured and on all sums converted into principal money . . . . shall become accumulated in the way of compound interest with half-yearly rests." Sums were so added to the principal money amounting to 2378*l.* and these sums were always net interest after deduction of income tax. The mortgagee then sold the reversion under his power of sale but left 25,500*l.* on mortgage to the purchaser. The mortgagee's solicitors received the balance of the purchase money amounting to about 6000*l.* and paid thereout the sum of 2378*l.*, and a sum of interest thereon as to which no question arose, to the mortgagor and paid the balance to a second mortgagee. An assessment to income tax was made on the solicitors to the extent of a sum arrived at by grossing up the net sum representing interest and deducting therefrom the mortgagor's taxed income for the relevant years, and the Crown claimed to recover income tax on the sum so assessed as being a payment of interest not made out of profits or gains brought into charge within r. 21 of the All Schedules Rules to the Income Tax Act, 1918, as amended.

Lawrence J. affirmed a decision of the Commissioners discharging the assessment and in so doing purported to follow *Inland Revenue Commissioners* v. *Holder* [1932] A. C. 624, *Earl of Carnarvon* v. *Inland Revenue Commissioners* (1934) 19 Tax Cas. 455 and *Marland* v. *Inland Revenue Commissioners* (1934) 19 Tax Cas. 467, in holding that the interest on the mortgage must be

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treated as having been paid half-yearly out of money advanced by the mortgagee.

The Court of Appeal held that it was impossible so to hold, as *Holder's* case (supra) was distinguishable and did not justify Singleton J.'s decision in *Earl of Carnarvon* v. *Inland Revenue Commissioners* (supra), while *Marland's* case (supra) was wrongly decided, but dismissed the appeal on the ground that, as at each half-year the net interest only was added to the principal money and accepted by the mortgagee in full satisfaction for the interest, the solicitors, when they paid the mortgagee out of purchase money the sum so added to the principal money, were not making a payment of interest within the rule. They were paying a sum that had already suffered tax by deduction and were under no liability to make any further deduction.

APPEAL from the decision of Lawrence J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on June 5, 1935, Messrs. Lawrence, Graham & Co. (hereinafter called "the solicitors") appealed against an assessment to income tax in the sum of 1421*l.* 10*s.* for the year ending April 5, 1932, made upon them under r. 21 of the All Schedules Rules to the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927.

The solicitors acted as solicitors to the Legal & General Assurance Society, Ld. (hereinafter referred to as "the Society"), when it was selling under its powers as mortgagee the reversionary interests of a Mr. X on which the society had lent money on mortgage.

By a mortgage dated January 13, 1925, Mr. X (hereinafter called "the mortgagor") had assigned to the society, subject to redemption, his reversionary interests under a will therein mentioned to secure the sum of 10,000*l.* advanced to him by the society. There was a personal covenant by the mortgagor to repay the sum advanced, and he also covenanted to pay such a rate of interest that after deduction of income tax for each periodical payment of interest there would remain a net sum equivalent to interest for the same period on the principal money intended to be thereby secured or for the time being remaining due at the rate of 5½ per cent. per annum, reducible on punctual payment to 4½ per cent. This interest was payable on January 10 and July 10 in every year.

The mortgage also provided in cl. 5 (B) that in case before the death of the survivor of the two life tenants (therein named) on whose deaths the reversions were expectant "any interest upon the principal money hereby secured or on any accumulations of interest arising under this present provision and added to principal money should not be paid on any half-yearly day hereinbefore appointed for payment of interest or within 30 days after such half-yearly day then from and after such default in payment and until the death of the survivor of the two life tenants (but without prejudice to the right of the society to require payment or the right of the borrower after due notice to make payment of the principal moneys and interest and accumulations of interest hereby secured) the sum due in respect of the half-year's interest so unpaid shall be converted into and become principal money as from the half-yearly day on which it became due and be added to the principal money hereby secured and shall carry interest at the rate aforesaid from the half-yearly day on which such half-year's interest became due and the interest upon all sums so converted into principal money shall be payable on the half-yearly days aforesaid but so that all interest unpaid on the original principal sum hereby secured and on all sums converted into principal money under this present provision shall become accumulated in the way of compound interest with half-yearly rests and the accumulated fund as well as the original principal sum hereby secured and the interest on such fund and sum shall constitute a charge upon the premises hereby mortgaged and the premises hereby mortgaged shall not be redeemed except upon payment of all principal moneys hereby secured and all interest and accumulations made as aforesaid of interest on such principal money and accumulations."

By two deeds of further charge, the first dated December 14, 1926, and made supplemental to the mortgage, and the second dated July 4, 1928, and made supplemental to the mortgage and first further charge further advances were made to the mortgagor, bringing the total sum advanced up to 25,500*l*. The interest reserved by the first charge was the sum as in the mortgage, namely, 5½ per cent. per annum reducible on punctual payment to 4½ per cent., and was payable on the same half-yearly dates. The interest reserved in the second further charge was 5*l.* 12*s.* 6*d.* per cent. per annum, reducible on punctual payment to 4*l.* 12*s.* 6*d.* per cent. and though by the deed it was payable on the same half-yearly dates, the dates for payment were at the request of the mortgagor altered to April 15 and October 15.

By virtue of a provision in each of the further charges the provisions of cl. 5 (B) of the mortgage were applied to the interest payable upon the further advances. Interest on the original and further charges was charged at the lower rates provided by the respective deeds.

By a deed dated October 14, 1929, the mortgagor created a second mortgage on his said reversionary interests to secure a sum advanced by the second mortgage and interest thereon as therein mentioned.

The interests on the original advance and upon the further advances from and including the interest due on April 15, 1930, down to and including the interest due on January 10, 1932, had not been paid by the mortgagor, but had been added to the principal money under cl. 5 (B) of the mortgage deed. The amount so added to principal was the net amount of the interest after deduction of income tax at the rate obtaining at the due dates for payment. The total amount so added, calculated to January 10, 1932, was 2378*l.* 19*s.* Further interest was accruing at the date of completion of the purchase. This interest calculated on part of the principal money from October 15, 1931, and on part from January 10, 1932, in both cases to March 14, 1932, amounted in all to 367*l.* 10*s.* 3*d.*

In 1931 the society, under their power of sale as mortgagees, had agreed to sell the said reversionary interests for the sum of 30,500*l.* to a purchaser to whom the same were duly assigned by a deed dated March 14, 1932.

On completion of the sale the sum of 31,778*l.* 3*s.* 9*d.* was due from the purchaser made up of 30,500*l.* the purchase money and 1278*l.* 3*s.* 9*d.* interest on purchase money less income tax due to delay in completion. Of this sum of

31,778*l.* 3*s.* 9*d.*, 25,500*l.* was re-lent by the society to the purchaser, and the balance of 6278*l.* 3*s.* 9*d.* was paid by a bankers' draft made payable to the solicitors as the vendor's solicitors.

The solicitors paid to the society by their own cheque the sum of 2746*l.* 9*s.* 3*d.* (the aggregate of the sums of 2378*l.* 19*s.* and 367*l.* 10*s.* 3*d.*) still owing to the society for interest, and after paying the auctioneer's and their own charges paid the balance by their own cheque for 3244*l.* 3*s.* 10*d.* and 6*l.* 6*s.* to the solicitors for the second mortgagees of the said reversionary interests.

The assessment of 1421*l.* 10*s.* was arrived at by grossing up the said net sum of 2746*l.* 9*s.* 3*d.* and deducting therefrom the taxed income of the mortgagor for the relevant years and the taxed interest on the purchase money.

It was contended on behalf of the solicitors:

(1.) That there had been no payment at all of interest to the society and that in any case there had been no payment of interest by or through the solicitors;

(2.) Alternatively, that the interest, except for the last broken periods, had been paid when it was added to the principal, and

(3.) that on either view the assessment should be discharged.

It was contended on behalf of the Crown:

(1.) that interest amounting to 2746*l.* 9*s.* 3*d.* net had been paid to the society by or through the solicitors;

(2.) that what was paid to the society remained interest, notwithstanding the provisions of the mortgage deed, and that the interest was not paid when it was added to the principal sum, and

(3.) that the assessment was in respect of interest not paid out of profits or gains brought into charge, and should be confirmed in principle.

The Commissioners gave the following decision: "Dealing first with the second contention of the appellants, we hold, following the decisions in the cases of *Holder* v. *Inland Revenue Commissioners* (1), *Earl of Carnarvon* v. *Inland Revenue*

(1) [1932] A. C. 624; 16 Tax Cas. 540.

Commissioners (1) and *Paton* v. *Inland Revenue Commissioners* (2) that the interest was paid by the mortgagors at the respective dates when it was added to capital, and to this extent there was no payment of interest when the property was sold. As regards the last two broken periods, the interest on purchase money was more than sufficient to cover the interest paid for these periods, and there is no liability to account for the tax on this interest under r. 21.

We accordingly discharge the assessment.

In case our decision on this second contention is not correct, it is necessary to consider the appellants' first contention that there had been no payment of interest at all, and in any case no payment by or through them. Under s. 105 of the Law of Property Act, 1925, the purchase money had to be held by the appellants as agents for the first morgagees in trust to pay the costs and the principal and interest due to the first mortgagees. The appellants received the whole of the purchase money and under the instructions of the first mortgagees paid to them out of the purchase money the amount due to them, namely, the principal and the interest less tax. After deducting the costs the appellants paid over the balance to the second mortgagees in accordance with the provisions of s. 105.

It seems clear to us from this statement :

(1.) that what the purchasers paid was the purchase money and the interest thereon, and that no part of their payment was earmarked as interest on the mortgages, and there was thus no liability on them to account for any tax on the mortgage interest ;

(2.) that the first mortgagees received the interest due to them and received it under deduction of tax ;

(3.) that the fact that the interest was retained out of a sum in the hands of the first mortgagees or their agents made it none the less a payment of the interest ;

(4.) that the appellants were the persons through whom the interest was paid to the first mortgagees, for whom they were acting as agents ;

(5.) that except to the extent that the interest on purchase money had suffered tax the interest paid to the mortgagees was not paid out of profits and gains brought into charge.

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(1) (1934) 19 Tax Cas. 455.

(2) Tax Leaflet 798.

The appellants, therefore, having deducted tax from the interest were liable to account for the tax so deducted, so far as the interest was not paid out of profits and gains brought into charge."

On appeal by the Inland Revenue Commissioners it was admitted on behalf of the Commissioners that on the first ground, on which the Commissioners based their decision, the case was governed by *Inland Revenue Commissioners* v. *Holder* (1), and Singleton J.'s decisions in *Earl of Carnarvon* v. *Inland Revenue Commissioners* (2) and *Marland* v. *Inland Revenue Commissioners* (3), and accordingly Lawrence J. dismissed the appeal.

The Inland Revenue Commissioners appealed. The appeal was heard on February 1, 2 and 3, and March 3, 1937.

Sir Donald Somervell A.-G., J. H. Stamp and R. P. Hills for the appellants. The position under a mortgage providing for the addition of arrears of interest to the principal money ought not to be treated in the same way as bankers' provisions for dealing with overdraft, and *Inland Revenue Commissioners* v. *Holder* (1) has therefore no application to the present case. Here the payment of interest is made when it is actually paid, and r. 2 of the All Schedules Rules to the Income Tax Act, 1918, therefore applied when payment was made by the solicitors to the society out of the proceeds of sale. *Rye & Eyre* v. *Inland Revenue Commissioners* (4) is distinguishable. The view that r. 21 applies here receives support from *In re Morris* (5): see also *In re Jauncey* (6). Singleton J. was wrong is applying *Inland Revenue Commissioners* v. *Holder* (1) to mortgages in *Carnarvon's* case (2) and *Marland's* case. (3)

The practice of bankers which was in question in *Holder's* case (1) dated back to a time before the repeal of the usury laws when it was not legal in a contract to provide for the charging of compound interest. The banks therefore adopted the practice of treating the bank as making a fresh advance to a customer of the interest due at the end of each interest period and the legality of this was recognized by the Courts: *Ex parte Bevan* (1); *Eaton* v. *Bell*. (2) But these cases had no application to mortgage transactions: *Rufford* v. *Bishop*. (3) In the case of a mortgage the difficulty in regard to charging compound interest was not got over by adding the interest to the principal money and treating it as a new capital advance. The money received by the solicitors was subject to s. 105 of the Law of Property Act, 1925, under which a first mortgagee, and therefore the solicitors as the agents of the first mortgagee must pay him in full and then pay the balance to the second mortgagee. The solicitors thus were persons by and through whom interest on money was paid within r. 21, and the liability for income tax arose as payment was made out of a fund which had not suffered tax.

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(1) [1932] A.C. 624; 16 Tax Cas. 540.

(2) 19 Tax Cas. 455.

(3) (1934) 19 Tax Cas. 467.

(4) [1935] A. C. 274; 19 Tax Cas. 164.

(5) [1922] 1 Ch. 126.

(6) [1926] Ch. 471.

[They also referred to *Fergusson* v. *Fyffe* (4), *Crosskill* v. *Bower* (5) and *Morse* v. *Salt*. (6)]

Latter K.C. and *Cyril King* for the respondents. What was covenanted to be paid as interest was a gross sum, but the sum added to the principal money in respect of interest in arrears was a net sum after deduction of income tax and the payment made out of the proceeds of sale by the solicitors to the society was therefore made up of sums from which tax had been deducted: see *Brooke* v. *Price* (7) and *In re Gretton's Indenture*. (8) The sum which the society received had suffered taxation. The only obligation of the society, therefore, was to pay itself and to pay the balance of the purchase money to the second mortgagee.

The whole basis of the Crown's argument rests on the view that at the time of the sale the sum due to the society from the mortgagor is interest. This does not accord with the fact that each sum of interest in arrear had been capitalized.

(1) (1803) 9 Ves. 223.
(2) (1821) 5 Barn. & Ald. 34.
(3) (1829) 5 Russ. 346.
(4) (1840) 8 Cl. & F. 121.
(5) (1863) 32 Beav. 86.
(6) (1863) 32 Beav. 269.
(7) [1917] A. C. 115.
(8) [1923] 1 Ch. 77, 88.

In re Morris (1) is an authority for the view that the society's solicitors acted rightly, because r. 21 has no application to a fund that has already suffered tax.

Again, there has been no payment of interest to bring r. 21 into operation. The words of r. 21 are not "received" interest, but "paid" interest. All the society did was to retain the amount due to it before paying the balance to the second mortgagee.

[ROMER L.J. It is said that the society by its solicitors paid money to the second mortgagee which ought to have been held in trust for the Crown.]

Yes, but for the reasons already stated, nothing was due to the Crown. Here, on the construction of the mortgage deed, the interest in arrears was capitalized. Notionally the interest was paid then and the tax deducted, seeing that it was net interest only that was capitalized.

Sir Donald Somervell A.-G. in reply.

The person by or through whom a payment is made is by r. 21 under an obligation to discover the tax position and to pay tax if r. 21 applies. The words are wide and this is clearly a case falling within them. Here the solicitors assumed the duty of distributing the purchase price among the persons entitled to it. They were, of course, solicitors to the society and in that sense under a duty to distribute the fund. Solicitors are supposed to advise their clients as to the laws and here there was a well recognized liability when paying interest to account for tax. The position would be the same if the money had been paid direct to the society for then under s. 105 of the Law of Property Act, 1925, it would have been under an obligation to take the gross income out of the fund and to pay itself the net income and account for the remainder to the Crown.

This case differs from *Rye & Eyre* v. *Inland Revenue Commissioners.* (2) Although the interest was added to the capital there would be no payment of income tax until the amount so converted was actually paid: *In re Morris.* (3)

Cur. adv. vult.

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(1) [1922] 1 Ch. 126, 134. (2) [1935] A. C. 274; 19 Tax Cas. 164.
(3) [1922] 1 Ch. 126.

1937. Mar. 3. The judgment of the Court (LORD WRIGHT M.R., Romer and Greene L.JJ.) was read by :—

ROMER L.J. This appeal comes before us in the following circumstances: By a mortgage dated January 13, 1925, a reversionary interest was assigned to the Legal & General Assurance Society (hereinafter referred to as "the society") to secure a sum of 10,000*l.* The deed contained a covenant by the mortgagor to repay the sum advanced and also a covenant to pay half-yearly such a rate of interest thereon that after deduction of income tax from each periodical payment there would remain a net sum equivalent to interest for the same period on the principal money for the time being remaining due at the rate of 5½ per cent. per annum reducible on punctual payment to 4½ per cent. [His Lordship then read cl. 5 (B) of the mortgage and continued :]

By two deeds of further charge dated December 14, 1926, and July 4, 1928, respectively, further advances were made by the society to the mortgagor bringing the total sum advanced up to 25,500*l.* Except that in the case of the latter of these two deeds the net rate of interest was 5*l.* 12*s.* 6*d.* per cent. per annum, reducible on punctual payment to 4*l.* 12*s.* 6*d.* per cent. the further advances were made on precisely the same terms as applied to the original advance.

Default was made by the mortgagor in paying the half-yearly interest due on April 15, 1930, and all the interest that fell due after that date down to January 10, 1932. Such interest was accordingly added to the principal money under the provisions of cl. 5 (B) of the mortgage deed of January 13, 1925, which provision had been incorporated in the deeds of further charge. The amount so added to the principal was the net amount of the interest calculated at the lower rates mentioned in the deeds after deducting therefrom income tax at the appropriate rate. The total amount so added to the principal sum of 25,500*l.*, calculated to January 10, 1932, was 2378*l.* 19*s.*

In the meantime, by deed dated October 14, 1929, the mortgagor had created a second mortgage on the reversionary interest to secure a principal sum advanced by a second mortgagee and interest thereon as therein mentioned.

By deed dated March 14, 1932, the society, in exercise of their power of sale as mortgagees, assigned the reversionary interest to a purchaser for the sum of 30,500*l.* Of this sum it was agreed that 25,500*l.* should remain on mortgage, with the result that, upon completion of the sale, a sum of over 6000*l.* representing the balance of the purchase money with certain interest thereon, became payable by the purchaser. It was not, however, paid to the society but to the respondents, Messrs. Lawrence, Graham & Co., as the society's solicitors. The respondents thereupon paid the society the sum of 2378*l.* 19*s.* and a further sum representing net interest accruing to the Society but not yet added to capital, and after paying the costs of the sale paid the balance of the money received from the purchaser to the second mortgagees. The sum representing net interest accruing under the society's mortgage and not added to capital was less than the interest paid by the purchaser on his purchase money, and this latter interest had been paid by the purchaser after deducting income tax thereon. Moreover, as already stated, the interest that had been added to the principal money due to the society was net interest only, that is to say, the gross interest after deduction of tax.

In these circumstances it would not at first sight appear that the society, and still less the society's solicitors, could be assessed to income tax in respect of any of the money received by the society out of the proceeds of sale of their mortgage security. An assessment was nevertheless made upon the solicitors for the year 1931–1932, it being sought to justify such assessment under the provisions of r. 21 of the General Rules applicable to all schedules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927.

That rule, so far as is material, is in these terms :—

"(1.) Upon payment of any interest of money . . . . charged with tax under Schedule D . . . . not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon in force at the time of payment.

(2.) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person.

(2A.) The Special Commissioners may, where any person has made default in delivering an account required by this rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment."

It is not necessary for the purposes of this judgment to state the precise amount of the assessment or the way in which it was calculated; for the calculation was complicated by the fact that credit was given for certain profits and gains of the mortgagor that had been brought into charge and by the payment of interest on the purchase money. But assuming, for the sake of simplicity, that these complications did not exist, the contention on the part of the Crown can be stated as follows: when the sum of 2378*l.* 19*s.* was paid to the society out of the purchase money there was a payment of interest, within the meaning of r. 21, not payable out of profits or gains brought into charge; the respondents were persons by or through whom such payment was made, and are, therefore, liable to be assessed in an amount arrived at by "grossing" the said sum.

The respondents in due course appealed against the assessment and the appeal was allowed by the Special Commissioners. They held, purporting to follow a decision of this Court and two decisions of Singleton J., to which we refer later, that the interest was, or must be deemed to have been, paid by the mortgagor at the respective dates when it was added to the capital out of fresh advances made to him by the society for that purpose and that to this extent there was no payment of interest when the property was sold. They accordingly discharged the assessment. They were, however, of opinion, in case they were wrong in holding that the interest had been paid by the mortgagor (treating again the complications above referred to as non-existent) (1.) that the society were paid the interest by the respondents out of the purchase money; (2.) that the society received it under deduction of tax; (3.) that the respondents were the persons through whom the interest was paid to the society and (4.) that the respondents having deducted tax from the interest were liable to account for the tax so deducted.

The case was then taken by way of appeal to Lawrence J., who affirmed the decision of the Commissioners that the interest had been paid by the mortgagor, holding himself bound by the three cases which the Commissioners had purported to follow. He expressed no opinion upon the liability of the respondents to assessment should it be held that the interest had not been paid by the mortgagor.

From that decision of Lawrence J. an appeal has been taken to this Court and now falls to be decided.

For the purpose of our decision it becomes necessary, in the first place, to consider the cases on which the Commissioners and Lawrence J. relied.

The first of these is *Inland Revenue Commissioners* v. *Holder*. (1) That was a case in which a company had been allowed an overdraft by its bankers, on which overdraft the bank were entitled to charge interest. In accordance with the usual practice of bankers the balance of principal and interest was struck at the end of each half-year and the aggregate sum was introduced as the first item in the subsequent half-yearly account, and interest calculated upon it. In other words the company was charged compound interest. In these circumstances this Court held that the bank must be regarded as having made, each half-year, an advance to the customer of a capital sum equal in amount to the interest then falling due, which sum had been applied by the customer

(1) [1932] A. C. 624; 16 Tax Cas. 540.

in paying that interest. There had been no express agreement between the parties as to the charging of compound interest by the bank. The bank, in charging it, had merely followed the ordinary practice of bankers, and the customer had acquiesced in their doing so. But that practice of bankers is an old one dating back to long before the repeal of the usury laws, and could not, therefore, have been legal unless it was consistent with those laws. Now before the repeal of those laws a contract to allow the charging of compound interest was illegal. The legality of the practice of bankers was, however, upheld by the Courts by treating the bank as making a fresh advance to its customer at the end of each year or half-year as the case might be: see (e.g.) *Lord Clancarty* v. *Latouche* (1). There is nothing contrary to the usury laws in such an arrangement: see *Ex parte Bevan.* (2) It is plain that upon the repeal of those laws an agreement to pay compound interest became lawful. In *Holder's* case (3), however, there was no agreement to pay it. The bank had merely pursued an old practice of bankers upon which an interpretation had been put by the Courts. The fact that this had been done at a time when the laws against usury were in force appeared to this Court to be immaterial. The practice continued after the repeal of those laws and the repeal could not affect the nature of the practice.

But a stipulation in a mortgage deed for payment of compound interest stands upon a different footing. Before the repeal of the usury laws such a stipulation would have been illegal, except perhaps in the case of a mortgage of a reversionary interest, in which case there is some ground for thinking that even in those days it would have been supported: see *Howard* v. *Harris.* (4) The question whether since the repeal of the usury laws effect would be given to such a stipulation in a mortgage, not being one of a reversionary interest, has caused some difference of judicial opinion. The matter is elaborately discussed in Coote on Mortgages, 7th ed., vol. I, pp. 139–143, but need not be discussed here. For even if such a stipulation would still be ineffectual as between mortgagor and mortgagee if the former should choose to dispute it, the difficulty would not be got over by treating the stipulation as one that provided for fresh capital advances being made by the mortgagee from time to time. The stipulation would not, by being so construed, become any the less objectionable. The cases relating to the practice of bankers in charging compound interest have not, therefore, any application to mortgage transactions: see, too, *Rufford* v. *Bishop*. (1)

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(1) (1810) 1 Ball & B. 420.

(2) 9 Ves. 223.

(3) [1932] A. C. 624; 16 Tax Cas. 540.

(4) (1683) 1 Vern. 190, 194.

It was, however, with mortgage transactions that Singleton J. was concerned in the other two authorities upon which the Special Commissioners and Lawrence J. relied in the present case. These two authorities were *Earl of Carnarvon* v. *Inland Revenue Commissioners* (2) and *Marland* v. *Inland Revenue Commissioners*. (3) In the first of them the mortgagor agreed to pay interest on a named day in each year and it was agreed that if such interest were not paid on the due date it should be deemed to be a new loan and should be capitalized and added to the principal sum and should thenceforth carry interest. As each instalment of interest fell due the net amount thereof, after deducting income tax, was added by the lenders to the principal sum in accordance with the agreement. A question subsequently arose between the borrower and the Crown as to whether he had paid the interest in each year so as to be entitled to deduct it in computing his income for the purpose of surtax. Singleton J. held that the interest had been paid. He said (4): " Under the loan agreement interest was payable. True, the interest was in fact capitalized. That was done as a result of the provision of the agreement as to what should happen if the interest was not paid on the due date. I find it difficult to draw a distinction between such a case and the method in which the account was kept by the bank in *Holder's* case (5); and it seems to me that the same reasoning applies as that of Lord Justice Romer, which I have already cited: 'The company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company.' It is true that that was a case as between banker and customer; but I do not see why, under the agreement in the present case, the appellant should not be deemed to have paid the interest by reason of an advance made for that purpose by the Insurance Company."

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(1) 5 Russ. 346, 353.
(2) 19 Tax Cas. 455.
(3) 19 Tax Cas. 467.
(4) 19 Tax Cas. 465.
(5) [1932] A. C. 624; 16 Tax Cas. 540.

It is not material for the present purposes to consider whether or not the decision of the learned judge can be supported upon other grounds. We are, however, for the reasons already given, unable to agree with him that the decision in *Holder's* case (1) justified his conclusion. The question before him was purely one of the proper construction to be placed upon an express agreement between a mortgagor and his mortgagee. That agreement provided in terms for the addition of interest to the capital sum as a new loan. We do not think that when that provision was carried into effect the mortgagor could properly be regarded as paying the interest out of the new loan.

The facts in *Marland's* case (2) were slightly different. The principal sum and interest chargeable annually were secured on a policy of insurance, and the loan agreement provided that compound interest was to be charged on all interest remaining unpaid for more than one month. The borrower was not to be personally liable for the payment of either principal or interest, but the borrower could, if he thought fit, pay the interest within one month after it fell due. He did not on any occasion pay the interest within one month after it fell due, and in each case the net amount was added to the loan by the mortgagees and interest thereafter was charged upon it. The same question arose between the borrower and the Crown as had arisen in *Lord Carnarvon's* case (3), and was again decided by Singleton J. in favour of the borrower upon the authority of *Holder's* case. (1)

In our opinion that decision cannot be supported. In that case there was not even any provision for capitalization of interest in the strict sense, but merely a provision for charging compound interest. There is not, in our judgment, any justification, either in principle or in authority, for treating the latter provision as one that involves a notional payment of the interest at each yearly or half-yearly rest as the case may be.

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(1) [1932] A. C. 624; 16 Tax Cas. 540.

(2) 19 Tax Cas. 467.

(3) 19 Tax Cas. 455.

In these circumstances it is, in our opinion, impossible to treat the interest in the present case as having been paid by the mortgagor half-yearly out of the sums advanced to him for the purpose by the society.

But this by no means disposes of the matter. It is still necessary to examine the transactions between the parties for the purpose of seeing whether the respondents are persons by or through whom any payment of interest has been made within the meaning of r. 21, sub-r. 2.

Turning once more to the rule it will be seen that it imposes on every such person an obligation to deduct out of the interest a sum representing the tax thereon. It is plain that this does not necessitate the actual setting aside of cash to meet the tax. A deduction in account is sufficient. If instead of paying the full amount of the interest the debtor pays to his creditor the interest less the tax, he has fulfilled his obligation, even though the payment exhausts his cash in hand or, if paid by cheque, leaves nothing standing to his credit at his bankers. So long as the net interest and no more reaches the hands of the creditors the Crown has no cause for complaint. Nor can the Crown be concerned with the form in which the net interest reaches the hands of the creditor. The creditor may, if he thinks fit, agree to accept in full satisfaction of the net amount a bill or a bond or a chattel provided that the money value of what he gets in exchange does not exceed the net interest due. If this be so, a mortgagor and a mortgagee may validly agree that, in the event of failure by a mortgagor to pay the net interest as it falls due, the mortgagee will from time to time accept in full discharge of the mortgagor's liability to pay it a capital charge for a like amount upon the mortgage security. As and when each charge takes effect the tax will have been deducted within the meaning of the rule, for the capital charge merely takes the place of a payment by the mortgagor of the net amount and can never exceed that net amount in money value.

In our judgment the arrangement that was made between the mortgagor and the society in the present case was of that nature. It is true that by the deeds of mortgage and further charge the mortgagor covenanted to pay the gross interest. But whether such interest was payable out of profits and gains brought into charge or not, the mortgagor could not have been compelled by the mortgagee to pay more than the net amount. When, therefore, it was provided by cl. 5 (B) of the mortgage deed that if any interest should not be paid on any half-yearly day appointed for its payment, or within thirty days thereafter, the sum due in respect of the half-year's interest so unpaid should be converted into and become principal money the sum due must mean the net amount of the interest after deduction of tax. The thing that is to be converted into principal money is the sum that could otherwise have been recovered from the mortgagor; that is the net amount. In this connection it is to be noticed that it is not "the interest" that has to be converted into principal money, but "the sum due," a change of language that must have been intentional. In our opinion, in each half-year that net interest was added to the capital the mortgagor deducted the tax as required by r. 21 and the society accepted the capital charge in full satisfaction of the interest after such deduction had been made. This being so, when the respondents paid to the society out of the purchase money the sums that had been so added to the principal moneys secured they were paying a sum that had already suffered tax, and were under no liability to make any further deduction. It is plain that such a sum is not interest within the meaning of the rule.

In these circumstances it is unnecesary to express any opinion upon the question whether, in view of the respondents' position in the matter, they could in any case be properly described as persons by or through whom the interest had been paid.

The appeal fails and must be dismissed with costs.

Appeal dismisssd.

Solicitors: *Solicitor of Inland Revenue; Lawrence, Graham & Co.*

H. C. G.

C. A.

1937
Feb. 22,
23, 24;
March 22.

BERESFORD *v.* ROYAL INSURANCE COMPANY, LIMITED.

[1935. B. 1994.]

Insurance (Life)—Suicide of assured while sane—Felony—Public policy —Administratrix not entitled to recover policy money.

The personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys from the insurance company, for it would be contrary to public policy that the Court should assist a man who has committed a felony or his representative to recover the fruits of his crime.

It makes no difference that the policy on its true construction binds the insurance company to pay in the event of the assured's suicide while sane, for the Court will not enforce a provision which is illegal or contrary to public policy however absolute it may be in terms.

APPEAL from a decision of Swift J. sitting with a special jury.

The facts, which are more fully stated in the judgment of Lord Wright M.R., were briefly as follows:—

In 1925 Major Charles William St. John Rowlandson insured his life under a number of policies with the Royal Insurance Co., Ld., for 81,000*l.*, but later the total sum for which his life was insured was reduced to 50,000*l.* Owing to his financial circumstances he found it increasingly difficult to pay the premiums, and to assist in this he borrowed sums amounting to 7531*l.* from the insurance company on the security of the policies. Being unable to pay the premiums which fell due on June 16, 1934, he obtained successive extensions of the time for payment, the last of which was to expire at 3 P.M. on August 3, 1934. Two or three minutes before this time Major Rowlandson shot himself while travelling in a taxicab in St. James's Street. At the time of his death he was in debt for more than 60,000*l.* His niece, who is the plaintiff in this action, took out administration to his estate with the will annexed and she brought these proceedings to recover the net sum due on the policies.

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Each of the policies provided that "unless it is otherwise provided in the Schedule, this policy is free from all restrictions as to residence, travel and occupation and, subject to endorsed conditions, is indisputable." Clause 4 of the conditions provided: "If the life or any one of the lives assured shall die by his own hand, whether sane or insane, within one year from the commencement of the assurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a bona fide interest for pecuniary consideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors."

After hearing evidence the jury had two questions put to them which, with their answers, were as follows:

Was Major Rowlandson at the time when he shot himself labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong? No.

Was he, when he shot himself, possessed of that degree of physical, intellectual and moral control over his actions which a normal man would possess? Yes.

The question was then argued whether on these findings the insurance company were liable to pay the amount of the policy moneys less loans to the plaintiff.

Swift J. said that the defendants contended that as it was established by the verdict of the jury that the assured died feloniously by his own hand public policy prevented them from paying the policy moneys to his estate. For the plaintiff it was contended that as none of the conditions in the schedules to the policies had been fulfilled it would be contrary to public policy to allow the insurance company to repudiate their contract. After examining the authorities as to the meaning of public policy, he said that there was here a contract which was quite clear and definite in its terms and was to be indisputable save for certain exceptions in the schedules which had not arisen. It was properly performed by the assured, who for many years paid premiums, and when the contract ended by the happening of the event on which the insurance company became liable—namely, the death of the assured—the only thing which remained was for the insurance company to pay the money they had contracted to pay. The insurance company might have inserted in their policy a condition that they would not be liable in case of insane or felonious suicide whenever committed. They did so for the first twelve months but not afterwards. After referring to *Cleaver* v. *Mutual Reserve Fund Life Association* (1) he (his Lordship) said he did not think that the defendants' contention prevailed. While he agreed that the law would not enforce a contract entered into in contemplation of a man committing a felonious act, he could not see why, when a perfectly legal contract had been entered into and had been observed by the parties for many years, one party to it should escape the liability which fell on him by alleging that the other had terminated it in an illegal manner when he had stipulated as part of the consideration for the bargain that he would not dispute it except for particular reasons none of which had occurred. Having considered a number of authorities he said he was not satisfied that it was contrary to public policy that the insurance company should pay having regard to all the circumstances of these particular policies.

The defendants appealed. There was also a cross-appeal by the plaintiff claiming a new trial on the ground of misdirection of the jury, but by arrangement the cross-appeal was not heard till later. The appeal was heard on February 22, 23 and 24, 1937, and judgment given on March 22, 1937.

Roland Oliver K.C., *Harold Murphy K.C.* and *E. Ryder Richardson* for the appellants. Swift J. was wrong in holding that the insurance company were liable to pay on the policies. No man can obtain a benefit for himself or his estate by committing a crime. Alternatively, it may be said that no man or his estate can recover on an insurance policy when the

(1) [1892] 1 Q. B. 147.

object insured has been deliberately destroyed by him. It was as if a man sought to recover on a policy of insurance against fire after he had himself burned down the premises insured. Some reliance had been placed on the provisions in the policies that they were to be indisputable subject only to the endorsed conditions all of which had been fulfilled. But that could not affect the law applicable. A rule resting upon general principles of public policy cannot be defeated by the private agreement of the parties: *Anctil* v. *Manufacturers' Life Insurance Co.* (1)

A point had also been made that as condition 4 in the schedule to the policy excluded liability on the assured committing suicide, whether sane or insane, within the first twelve months, the insurance company must by implication be liable in either case after the end of the first year. But such a contract would be void as an invalid condition. Swift J. has lost sight of the fact that when the assured commits suicide he cannot be said to be fulfilling his contract with the insurance company.

When the authorities are examined they will be found to support the appellants' contentions. *Amicable Insurance Society* v. *Bolland* (*Fauntleroy's* case) (2) decided that the assignees of a policy could not recover the policy moneys when the assured had committed a felony and been sentenced to death and executed. The present is a far stronger case, as here the assured committed suicide feloniously in order to obtain for his estate the fruits of the insurance policies. The Court was in fact being asked here to give the suicide's estate the fruit of his crime. Other material authorities in this connection were *Borradaile* v. *Hunter* (3); *Horn* v. *Anglo-Australian & Universal Family Life Assurance Co.* (4); *Wainwright* v. *Bland* (5); *Cleaver* v. *Mutual Reserve Fund Life Association* (6); and *Burrows* v. *Rhodes.* (7) In *Cleaver's* case (6), which related to the Maybrick murder, it was

(1) [1899] A. C. 604.
(2) (1830) 4 Bligh (N. S.) 194.
(3) (1843) 5 Man. & G. 639, 658.
(4) (1861) 30 L. J. (Ch.) 511.
(5) (1836) 1 Mood. & Rob. 481.
(6) [1892] 1 Q. B. 147.
(7) [1899] 1 Q. B. 816.

decided that the assignees of Mrs. Maybrick, who had been found guilty of murdering her husband, could not recover on a policy on his life taken out by him in her favour. There Lord Esher said: "No doubt there is a rule that if a contract be made contrary to public policy, and if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity." He went on to say that the rule should be narrowly watched when that was vouched as an excuse for the non-performance of a contract by a party who had received the full consideration. There it was true to say that the insurance company had received the full consideration; but here the assured by committing suicide deprived the insurance company of the right to receive premiums during his natural life. James Maybrick had done no wrong and broken no contract and the benefit of the insurance in fact enured in his favour. Similar cases are *In the Estate of Hall* (1), where it was held that a person responsible for the death of a testator by manslaughter could take no benefit under his will, and *In the Estate of Crippen* (2), where it was decided that a murderer could not benefit under the will of the murdered person.

Cases where death has been caused by a motor accident are distinguishable, for in those cases the death is caused by negligence and not by a felony: see *Tinline* v. *White Cross Insurance Association, Ld.* (3) and *James* v. *British General Insurance Co.* (4), cases which were discussed in *Haseldin* v. *Hosken.* (5)

The result of the authorities referred to was to show that the law was well settled which decided that neither a man nor his estate can obtain a benefit as a result of his felony. That principle was directly applicable here. The whole basis of the case against the insurance company was that they had insured against the committal of the crime of suicide and were therefore liable, but these cases showed that such a contract would be illegal.

(1) [1914] P. 1.
(2) [1911] P. 108.
(3) [1921] 3 K. B. 327.
(4) [1927] 2 K. B. 311.
(5) [1933] 1 K. B. 822.

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Sir William Jowitt K.C. and *A. T. Denning* for the respondent. The appellants have fallen into the error of treating a contract for life assurance as if it were a contract of indemnity. It differs from insurance against fire or accident as these were contracts of indemnity. The question raised by the insurance company in this case had never been raised before. The normal course in the old days was expressly to exclude by the policy the right to recover when the assured took his own life, whether sane or insane: see *Borradaile* v. *Hunter.* (1) It was common knowledge how largely insurance entered into the affairs of everybody and how common the practice was of borrowing on the security of an insurance policy. Was it to be said that the doctrine of public policy went so far as to deprive a lender of his security if the assured committed suicide while sane? Why should public policy allow an insurance company to retain policy moneys in such a case when it might well be that the assured had paid more than the value of the policy in premiums? The Court should keep in mind what was said by Lord Esher in *Cleaver's* case. (2)

In considering the authorities cases relating to indemnity policies should be excluded from consideration and cases also depending on the principle that one who has struck down his benefactor cannot take a benefit through him. *Fauntleroy's* case (3) must be accepted as authoritative, but it was necessary to bear in mind that the Courts did not remain static and their view in regard to the doctrine of public policy had changed since then. This was pointed out by Roche J. in *James* v. *British General Insurance Co.* (4) Other cases throwing light on the question of public policy that had not yet been cited were *Cook* v. *Black* (5); *Clift* v. *Schwabe* (6), where the plea of suicide was raised but the case dealt with purely on the construction of the contract between the parties; *Moore* v. *Woolsey* (7); *Dufaur* v. *Professional Life Assurance Co.* (8), where the position of an assignee of the policy received special protection: *Prince of Wales, &c., Association* v. *Palmer* (1); *Stormont* v. *Waterloo Life & Casualty Assurance Co.* (2); *Jackson* v. *Forster* (3), where again there was a mere question of the construction of the policy; and *White* v. *British Empire Mutual Life Assurance Co.* (4)

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(1) 5 Man. & G. 639.
(2) [1892] 1 Q. B. 147.
(3) 4 Bligh (N. S.) 194.
(4) [1927] 2 K. B. 311, 322.
(5) (1842) 1 Hare 390.
(6) (1846) 3 C. B. 437.
(7) (1854) 4 El. & Bl. 243.
(8) (1858) 25 Beav. 599.

The group of cases where someone did a wrongful act against another member of the public stood by itself. In such a case it is plain law that he could not recover any benefit from his wrongful act: compare *In the Estate of Crippen* (5) and *In the Estate of Hall* (6), where rights under wills were forfeited, and *Cleaver* v. *Mutual Reserve Fund Life Association* (7), where the wrongdoer forfeited his rights under a policy. In such a case the assignee of the wrongdoer also forfeited his rights. Again in *Fauntleroy's* case (8) the assured had committed forgery and was executed. Down to 1870 any person found guilty of forgery suffered forfeiture of all goods. In the case of suicide the forfeiture was less complete and members of the public were not so directly involved. There had never been an insurance case where the position on the suicide of the assured was not determined on the construction of the policy.

[LORD WRIGHT M.R. Has there been such a case before when it was found that the suicide was felo de se?]

It is thought not. Suicide might be a meritorious act as in the case of Captain Oates belonging to Scott's expedition to the South Pole. If there was no provision in a policy dealing with suicide would the Court imply a clause to extend to such a case as that and would the clause be limited to cases of felo de se only. The Courts would, it is suggested, be slow to import any such provision into a policy.

However that might be when the policy was silent on the matter, this case was different, for the only possible construction of the policy was that when once the first twelve

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(1) (1858) 25 Beav. 605.
(2) (1858) 1 F. & F. 22.
(3) (1859) 29 L. J. (Q. B.) 8; 1 El. & El. 463.
(4) (1868) L. R. 7 Eq. 394.
(5) [1911] P. 108.
(6) [1914] P. 1.
(7) [1892] 1 Q. B. 147.
(8) 4 Bligh (N. S.) 194.

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months were past the insurance company would pay in case of suicide by the assured whether he was sane or insane.

All the cases made it plain that the points for consideration were (1.) whether there was an implied term in the policy; and (2.) whether there was an overriding consideration of public policy. In *Cleaver's* case (1) Lord Esher said: "That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy. But this doctrine ought not to be stretched beyond what is necessary for the protection of the public."

[Lord Wright M.R. The public has an interest in a man's life and it is contrary to the law for him to kill himself.]

In such a case the public has a very indirect interest. In *Burger* v. *South African Mutual Life Insurance Society* (2) the assured met his death while in rebellion in South Africa, and his assignee was held to be entitled to recover under a policy on his life. It would be disastrous if when a motor driver had committed a statutory offence his policy was invalidated so as to deprive the persons injured of the benefit of the policy. This indicated what care should be taken not to extend the application of the doctrine of public policy.

There were a number of American authorities dealing with the present question and they were discussed by Professor A. L. Goodhart in the Law Quarterly Review for October, 1936, p. 575: see *Ritter* v. *Mutual Life Insurance Co.* (3); *Northwestern Mutual Life Insurance Co.* v. *Johnson* (4); *Whitfield* v. *Ætna Life Insurance Co.* (5); and *Northwestern Mutual Life Insurance Co.* v. *McCue.* (6)

To sum up, the contentions for the respondent were, first, that the only principle of public policy applicable was to allow freedom of contract, and secondly, that on the construction of the policies the insurers had by implication told the assured that they would pay the assured's executors on his death, even though it was brought about by his deliberate suicide, provided that it was more than a year after the date of the policies. Thirdly, the answer to the attempt to apply the doctrine that no one could take advantage of his own wrongdoing was that when a contract was made to pay on a life policy, even though the assured's life was ended by deliberate suicide, the suicide was not a wrong as against the insurance company. A further answer was that the principle that no man could take advantage of his own crime had no application because the right to sue on the policy never was vested in the assured himself. The right of action arose only on his death. The plaintiff in this case was therefore suing on a right of action which vested in her after the assured's death. In that respect this case differed from such cases as *Cleaver* v. *Mutual Reserve Fund Life Association* (1) and *In the Estate of Crippen* (2): see also *P. Samuel & Co.* v. *Dumas.* (3)

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(1) [1892] 1 Q. B. 147, 152.
(2) (1903) 20 Cape S. C. R. 538.
(3) (1898) 169 U. S. 139.
(4) (1920) 254 U. S. 96.
(5) (1907) 205 U. S. 489.
(6) (1912) 223 U. S. 234.

[ROMER L.J. It astounds me to hear it suggested that a personal representative could have any better right than his testator. The right to enforce the contract of assurance was in the assured.]

The right to recover on the assured's death was never vested in the assured himself. Again, if it was correct to say that the policy contained by implication a contract to pay the policy money on the assured's death by suicide, and that to enter into such a contract was not against public policy, the Court could not allow the doctrine to apply that a man could not take a benefit from his own wrongs, for that would involve a refusal to enforce a contract which ex hypothesi was not against public policy.

[They also referred to *Ellinger & Co.* v. *Mutual Life Insurance Co. of New York* (4) and *Rowett, Leakey & Co.* v. *Scottish Provident Institution.* (5)]

Roland Oliver K.C. in reply. Personal representatives can have no better right than their testator or intestate. That point is really unarguable. Further, unless the view be taken that the insurance company had contracted to pay on the policies even if the assured deliberately committed suicide, the plaintiff had no case at all. The appellant's whole case is that the law will not give a felon or his representatives the fruit of his crime. There is no distinction in this respect between suicide and murder. Cases where there is an express provision protecting assigns for value in case of the assured's suicide do not assist such a contention, and the authorities already referred to of *Cleaver's* case (1); *Burrows* v. *Rhodes* (2); *In the Estate of Crippen* (3); and *In the Estate of Hall* (4) all lend support to the appellants' contention. *Burger* v. *South African Mutual Life Insurance Society* (5) is distinguishable.

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(1) [1892] 1 Q. B. 147.
(2) [1911] P. 108.
(3) [1924] A. C. 431.
(4) [1905] 1 K. B. 31.
(5) [1927] 1 Ch. 55.

Cur. adv. vult.

1937. March 22. The judgment of the Court (Lord Wright M.R., Romer and Scott L.JJ.) was read by LORD WRIGHT M.R. This is an appeal from a judgment of Swift J., which held that the plaintiff was entitled to recover on certain policies effected on his life by Major Charles William St. John Rowlandson the sums insured, amounting in all to 50,000*l.*

The plaintiff sues as administratrix with the will annexed of Major Rowlandson.

The principal defence as pleaded was that Major Rowlandson died by his own hand and that thereby the policies became void. It is not necessary to criticize the sufficiency of this plea, because, the jury having found by their verdict that the assured feloniously died by his own hand, the contention on behalf of the appellants before the judge, as he stated, was that public policy prevented them from paying the policy moneys to his estate and prevented his representative from recovering. The case was fought on this plea as though properly raised. This description by the judge of the conduct of the case before him equally applies to the conduct of the

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(1) [1892] 1 Q. B. 147.
(2) [1899] 1 Q. B. 816.
(3) [1911] P. 108.
(4) [1914] P. 1.
(5) 20 Cape S. C. R. 538.

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argument before this Court. No point of pleading was raised in this Court. Indeed, as will appear later, the facts are such that the Court would, in our opinion, have been bound on its own initiative to determine whether the policies were legally enforceable, even if the appellants had not raised the objection.

The undisputed facts are that the deceased had insured himself with the appellants some years before for sums amounting in all to 81,000*l.* at annual premiums totalling about 3000*l.* But he became financially embarrassed and cancelled some of the policies, so that the insurances were reduced to 50,000*l.* in all at the time of his death, which was August 3, 1934. Until the last premiums fell due he had managed to find money to pay the premiums, partly by borrowing from the appellants against the surrender value of the policies. A balance of 400*l.* remained due for premiums on June 16, 1934. To help him as far as they possibly could the appellants gave him gratuitous extensions of time. These ran out finally at 3 P.M. on August 3, 1934, when the policies would lapse if the premiums were not paid. He was unable to find the premiums. He was in debt to the extent of more than 60,000*l.* He had no assets and was at the end of his credit. At two or three minutes before 3 P.M. he shot himself in a taxicab in St. James's Street. He had left a letter with his solicitor, written that very morning, in which he said in effect that, though what he was about to do would be technically defrauding the insurance company, yet they would not notice a small matter like 50,000*l.*, less the loans, whereas it would be a serious matter, if the policy moneys were not paid, for the people who had believed in him and lent him these large sums of money.

The jury, in answer to the questions put to them by the judge, found that, according to the formula laid down in *Macnaughton's* (or *M'Naghten's*) case (1), he was not insane. They also found that when he shot himself he was possessed of that degree of physical, intellectual, and moral control over his actions which a normal man would have.

These findings beyond question amounted to a finding that the case was one of felo de se, or felonious suicide. It is clear that the assured deliberately killed himself to enable his estate to collect the insurance moneys. In two or three minutes the policies would have automatically expired, because he had no means of raising the premiums.

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(1) (1843) 4 St. T. (N. S.) 847; 10 Cl. & F. 200.

The respondent filed a cross-appeal claiming that the verdict should be set aside on various grounds of misdirection by the learned judge. That cross-appeal was at the respondent's request not proceeded with at this stage, but was reserved until this appeal had been decided, which accordingly has proceeded on the basis that the verdict of the jury stands.

On that basis Swift J. decided in the respondent's favour, on the ground, as it may be very summarily stated, that whatever considerations of public policy might be urged against a company paying on a life policy where the assured had feloniously taken his own life, yet where there was no idea of that kind when the policy was effected and where felonious suicide was not expressly excepted but impliedly covered, the dominant public policy to be observed was that of the sanctity of contract. The judge held that the appellants must fulfil their contract.

The policies expressed that the sums thereby assured were payable on the death of the life assured to the executors, administrators, or assigns of the assured and contained a term that, subject to the endorsed conditions, they were "indisputable." Of the endorsed conditions only condition 4 is material. It runs: "If the life . . . . shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a bona fide interest for pecuniary consideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors."

No part of this condition applied. The action, it is true, was brought by the plaintiff on behalf of the deceased's creditors, since the estate was being administered in Chancery and the right, if any, under the policies constituted the sole asset of the estate available to pay the creditors, but there was no assignment of any right under the policies to any creditor, nor were they held as security. Several years had elapsed since the commencement of the assurances.

On behalf of the respondent it was contended that the effect of condition 4 was that the appellants, by expressly providing that felonious suicide should discharge them if it occurred within one year of the policy commencing, impliedly undertook that after that period it should be no defence or, more precisely, the argument was that the policy, after the first year, became indisputable unconditionally, even in the event of felonious suicide. No question of public policy or illegality, it was said, was then open to the appellants. It was contended that the express limitation for the first year excluded any limitation whatever for any subsequent year, attention being particularly directed in this regard to the case of the assured committing suicide while sane, because condition 4 no longer applied. The importance of this to third parties becoming assignees or chargees for value was emphasized.

If the only question were the construction of the policy on ordinary principle there might be much plausibility in the contention that it was implied that it was to be enforceable in all events, including that of suicide by the assured while sane. But we do not think that the question is so concluded. However absolute in terms the policy might be the Court will not enforce it if it is illegal or contrary to public policy or if it is otherwise such an agreement as the Court in its inherent jurisdiction will refuse to enforce. To take an extreme instance, the Court would not enforce a promise to pay a sum of money in consideration of the plaintiff having, according to contract, committed a murder, or if the assured, having an insurable interest in another's life, had murdered the life insured and was seeking to collect the policy moneys.

The same principle has been applied to other types of illegality. Thus in *Anctil* v. *Manufacturers' Life Insurance Company* (1) a policy was expressed to be incontestable after one year during which premiums had been paid. But it was held that it was not enforceable because the assured had no insurable interest and the policy was therefore void under art. 2590 of the Civil Code of Lower Canada. Lord Watson said (2): "The rule of the Code appears to them" (their Lordships) "to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties."

It may here be convenient to deal with a contention made on behalf of the respondent, that she does not merely stand in the shoes of the assured, but, as an administratrix appointed by the Court, has, as it were, an independent root of title and is not affected by defences which would have been available if the assured had been suing, or even his assignees, as was the case in *Fauntleroy's* case (*Amicable Society* v. *Bolland*) (3), where the suit by the assignees of the policy was dismissed on the ground that the assured had been guilty of forgery and had been executed for the felony.

We do not think that this argument is well founded. We think the personal representative of the assured, though appointed under the Administration of Estates Act, 1925, has no better or other right to sue than the assured himself would have had. The promise is to pay the personal representatives or assigns, but it is a promise to the assured only and can be enforced, if at all, by the personal representative as such and not in her own right. The same is true of assigns.

This rule was in principle involved in the decision of Clauson J. in *In re Sigsworth* (4), following Farwell J.'s opinion in *In re Pitts.* (5)

The question, therefore, is whether the felonious suicide of the assured is a bar to the present action. If the assured had taken his life while insane, the fact would not have constituted a defence. The act of an insane person is not in law his act —*Felstead* v. *the King* (1)—and such a death is a death within the terms of the policy, unless there are special conditions excluding it. But suicide when sane is by English law a felony. This has been so from very early times. The law is thus succinctly stated by Stephen in his Digest of the Criminal Law (art. 319): "A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder." Hence, where there has been what is called a suicide pact between two persons and one survives the survivor is guilty of murder.

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(1) [1899] A. C. 604.
(2) Ibid. 609.
(3) 4 Bligh (N. S.) 194.
(4) [1935] Ch. 89.
(5) [1931] 1 Ch. 546.

The Forfeiture Act, 1870, which abolished attainder, corruption of blood, forfeitures, and escheats in the case of treason or felony or felo de se, has not changed the law. Thus, in *Rex* v. *Mann* (2), Lord Reading C.J. said: "We are of opinion that an attempt to commit suicide is an attempt to commit a felony." It may be noted that the forfeiture in the case of felo de se did not extend to lands of inheritance, nor was his blood corrupted nor was his wife barred of her dower—Hawkins' Pleas of the Crown (Book 1, Ch. IX., s. 8). The law is discussed by Hale's Pleas of the Crown (Ch. 31, pp. 411 and 412) and other writers.

This being the nature of felo de se by English law, and as the plaintiff, as personal representative, stands in the shoes of the assured who has committed, as it were, murder on himself, the present claim is equivalent technically to a claim brought by a murderer or his representative or assigns on a policy effected by the murderer on the life of the murdered man. In that latter case it is, we think, clear that neither the murderer nor his estate nor his assigns could take a benefit under the policy.

In principle this rule is involved in *Cleaver* v. *Mutual Reserve Fund Life Association* (3), where the murdered man had effected a policy on his life in favour of his wife. She murdered him. It was held that her assigns could not recover on the policy. In that case it is true there was held to be a resulting trust of the policy in favour of the deceased man's estate on the ground that, the deceased man, who was the assured, being innocent and the wife's interest being forfeited, the policy rights vested in his estate. No such trust, however, can arise here.

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(1) [1914] A. C. 534.
(2) [1914] 2 K. B. 107, 108.
(3) [1892] 1 Q. B. 147.

Similarly, a murderer cannot benefit under the will of the murdered man—*In the Estate of Cora Crippen* (1)—or under an intestacy—*In re Sigsworth.* (2)

The general principle was stated by Fry L.J. in *Cleaver's* case (3): "It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's* case (4) appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's* case (4) it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a cestui que trust asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy: and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it."

In *Fauntleroy's* case (4) the judgment in the House of Lords was delivered by Lord Lyndhurst L.C., who thus stated the position (1): "The question under these circumstances is this: whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble Lord"—Lord Radnor—"now present, and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy?" This was a less obvious case than a case of suicide. The forger had no intention of being executed; he presumably hoped to escape detection. The essential feature of the decision was that the Court would not allow a claim in contract to be based on the contracting party's crime as a necessary constituent of the cause of action, even though an interval of time and circumstance separated the crime from the resulting death.

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(1) [1911] P. 108.
(2) [1935] Ch. 89.
(3) [1892] 1 Q. B. 147, 156.
(4) 4 Bligh (N. S.) 194.

In a case like the present, the crime (for so it is regarded by English law) and the resulting death are identified. The precise facts in *Fauntleroy's* case (2) could not come into question in these days and the case is only cited for the general principle.

It may seem curious that there is, so far as we know, no decided case precisely in point in England. It may be explained by the notorious fact that juries will seldom find felo de se but generally bring in a verdict of suicide while insane.

(1) 4 Bligh (N. S.) 211. (2) Ibid. 194.

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Fauntleroy's case (1) was discussed but not applied by the Supreme Court of the Cape in *Burger* v. *South African Mutual Life Insurance Society* (2), where the assured, being a British subject, had been killed while in arms against the British Government. De Villiers C.J. refused to extend the principle of public policy to such a case and gave judgment for the executrix. It is not here necessary to express any view on the soundness of that decision, but the Chief Justice referred to the case of suicide. The policy contained a clause similar to condition 4 of the policy now in question. The Chief Justice thus expressed himself. (3) "The possibility of suicide was contemplated, and it was accordingly provided that if this should be the mode of death within one year from the date of the contract the policy should become void. If, instead of being killed in action, the deceased had committed suicide ten years after the date of the contract, there would have been good ground for invoking the principle of public policy against payment of the amount claimed, for there would have been some evidence that the illegal act causing his death had been contemplated. In the present case there is no evidence whatever that the deceased contemplated rebellion, or that he became a rebel with the object of thus hastening his death and securing the amount of the policy for his representatives. Having regard to the principle that where a person seeks to excuse himself from the performance of a contract in respect of which he has received the full consideration, the rule as to public policy should not be carried further than the protection of the public requires, I am of opinion that the defendant company is not protected by the rule."

If the Chief Justice meant to say that inability to recover in the case of the assured's felonious suicide depended on proof that such suicide was contemplated as a possibility when the policy was effected, we cannot, with deference, agree with that view. It may be that in *Burger's* case (2) the Chief Justice might have been led to the conclusion that the policy was not enforceable if he regarded such a clause

(1) 4 Bligh (N. S.) 194.
(2) 20 Cape S. C. R. 538.
(3) Ibid. 543.

as he sets out as being some evidence that suicide was contemplated when the policy was effected. It is not necessary to discuss here this way of looking at the matter.

Reference has also been made to a dictum to be found in *Horn* v. *Anglo-Australian and Universal Family Life Assurance Company* (1), where Wood V.-C., after referring to *Fauntleroy's* case (2), said: "So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby; but I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity and therefore committing no legal offence." The finding there was that the assured committed suicide while insane, and his personal representative recovered under the policy.

A number of cases were cited, but in no one of these was there a finding of felonious suicide. It was found in each case that the suicide had been committed during a period of temporary insanity. In some of these cases the questions arose under a condition common for many years in policies of life insurance.

An illustration is furnished by *Borradaile* v. *Hunter*. (3) The general form of the condition was that, if the assured should die by his own hand or by the hands of justice or in consequence of a duel, the policy would be void. That condition was held to cover a case where the assured took his own life, intending to do so, but was at the time not capable of judging between right and wrong and in that sense was insane. In *Clift* v. *Schwabe* (4) it was held that the word "suicide" in such a condition should be similarly construed and not limited to felo de se. In other cases the condition was that the policy, though void in the event of suicide, in other respects should operate to entitle the holder to recover to the extent of an assignment or bona fide interest. Such cases were: *Dufaur* v. *Professional Life Assurance Co.* (1) and *Rowett, Leakey & Co.* v. *Scottish Provident Institution* (2), in which latter case the interests of onerous holders were protected. There are in the books several such cases, but we do not think it necessary to discuss them further. No such question falls to be decided here as was necessary to be considered in them. We do not think they afford us any guidance.

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(1) 30 L. J. (Ch.) 511.
(2) 4 Bligh (N. S.) 194.
(3) 5 Man. & G. 639.
(4) 3 C. B. 437.

Authorities were cited from the Supreme Court of the United States. Decisions of that Court are always considered with great respect in the Courts of this country, and it has often been said that it is desirable to have uniformity in the law of contracts as far as possible in our two countries. The difficulty in the present connection is that these questions of public policy depend on the State law which governs the contract and that the law may differ in different States.

In *Ritter* v. *Mutual Life Insurance Co.* (3) it was held by the Supreme Court that, where an assured while sane had committed suicide, the policies on his life were not enforceable. The first ground on which the judgment was put was that such a death was not within the policy, which contained no express condition relevant to suicide. Harlan J. said (4): " But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise? " It may be that these observations were directed to the case where the policy was silent on this matter. The second ground of the judgment was that to allow recovery would be against public policy. Harlan J. said (5): " There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a Court of justice or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such a policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind? " The answer given by Harlan J., after an elaborate citation of authorities, was that such a risk could not legally be covered by the policies. The Court did not, it seems, consider the further question whether a Court should entertain an action in which the plaintiff or his representative was seeking to recover the fruits of a crime.

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(1) 25 Beav. 599.

(2) [1927] 1 Ch. 55.

(3) 169 U. S. 139.

(4) 169 U. S. 151.

(5) Ibid. 154.

Whitfield v. *Ætna Life Insurance Co. of Hartford* (1), decided in 1907, throws no light on the general question and turns, it seems, on the effect of the State law. It decided that, where the statutes of the State in which the policy was effected provided that suicide, unless contemplated when the policy was applied for, should be no defence, the policy must be enforced in a Federal Court, notwithstanding that it contained express terms limiting the recovery in the case of suicide to one-tenth of the sum assured. It does not appear that the assured took his life while of sane mind.

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(1) 205 U. S. 489.

In *Northwestern Mutual Life Insurance Co.* v. *McCue* (1), the assured had been executed for murder. It was held that by the law of Virginia, which was the relevant State law for the policy in question, death by the hand of the law was not covered by the policy, which was silent with regard to suicide. The Court held that it was immaterial to consider or ascertain what was the law of Wisconsin, where the insurance company had its head office.

In 1920, in *Northwestern Mutual Life Insurance Co.* v. *Johnson* (2) and another case which was reported at the same time, the Supreme Court again considered this type of question. The Court construed policies which contained clauses somewhat similar to condition 4 in the policies here in question as implying that suicide of the assured, whether sane or insane, after a specified time, should not be a defence. The headnote goes on thus to express the effect of the decision : " The validity of such agreements to pay life insurance, even when death is due to suicide, if it occur after the lapse of a certain time, depends upon the State public policy. Where it does not appear in what State the contracts in question were made, the Court upheld them, which, *semble*, is in accord with the rule generally prevailing." In *Johnson's* case (2) it did not appear that Johnson was insane when he killed himself. In the second case nothing is said on the question whether the assured was sane or insane. In the judgment delivered by that great judge Holmes J., *Whitfield's* case (3) was cited as an authority that public policy with regard to such contracts was a matter for the States to decide. *Ritter's* case (4) was not disapproved. It was, on the contrary, said that " all the circumstances gave moral support to the construction of the policy adopted by the Court in accordance with the view that has prevailed in some jurisdictions as to the general rule." (5) *McCue's* case (1) was not disapproved. The Court seemed to discuss public policy merely from the standpoint that " the mere evocation of a possible motive for self-slaughter is at

(1) 223 U. S. 234.
(2) 254 U. S. 96.
(3) 205 U. S. 489.
(4) 169 U. S. 139.
(5) 254 U. S. 101.

least not more objectionable than the creation of a possible motive for murder "—that is, where a policy on a man's life is assigned to a third party. The Court did not consider what the position would be if the assured or assignee of the policy murdered the life assured. We find it difficult to conceive that any Court would in that event enforce payment for the benefit of the murderer. But we do not think that the Court was considering any such case. The discussion seems to have been limited to the question whether the clause in reference to suicide, whether the man was sane or insane, rendered the policy void.

Whatever the position may be in the United States, where each State, by legislative or judicial action of its own, can, it seems, determine the legality of a policy which expressly or by implication provides for payment of the policy moneys in whole or in part in the case of suicide, sane or insane, we cannot, we think, consistently with the law of England, as we understand it, hold that the respondent can successfully maintain her claim.

Opinions may differ whether the suicide of a man while sane should be deemed to be a crime, but it is so regarded by our law. The old inquisition in the case of self-murder was felonice et voluntarie se ipsum inter fecit et murderavit—Hale's Pleas of the Crown (Ch. 31, p. 412). It may be that both ecclesiastical and civil penalties have been mitigated or abolished, but the criminal law still remains. Only the Legislature in this country can change the law in this matter, if it should so will. While the law remains unchanged the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the Court the fruits of his crime.

We have quoted the above authorities in support of that principle, which is of general import. The principle has been applied not only in the authorities quoted above but also in many decisions dealing with varied states of fact and applications of the same or similar principle. These are all illustrations of the maxim ex turpi causa non oritur actio. The maxim itself, notwithstanding the dignity of a learned language, is,

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like most maxims, lacking in precise definition. In these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification for a Court to apply the maxim. There are likewise some crimes of inadvertence which, it is true, involve mens rea in the legal sense but are not deliberate or, as people would say, intentional. Thus in *Tinline* v. *White Cross Insurance Association* (1) and *James* v. *British General Insurance Co.* (2), both cases of motor-car manslaughter, the judges held that policies against third-party liability were enforceable. In these cases something may turn on the special legislation on the matter. The cases have been questioned in *Haseldine* v. *Hosken* (3) but need not further be considered here.

The principle that a Court will not generally enforce transactions tainted with fraudulent or immoral purposes or objects has often been recognized and was recently expounded in a decision of the Court of Appeal in *Alexander* v. *Rayson.* (4)

A recent Act was necessary to change the law that there could be no contribution between tortfeasors. It is enough to say that we know of no case where a crime, such as our law holds felo de se to be—that is, a deliberate felony akin to murder—has been allowed to support an action by the criminal or his representative to recover the fruits of the crime. We think that what Greer L.J. said in *Haseldine* v. *Hosken* (5), " In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime," applies without qualification to a suicide such as that in question. The overriding duty or inherent power of the Court to refuse its aid to enforce a promise to pay in such circumstances excludes its general duty to enforce performance of contracts.

There may seem a hardship in holding that the appellants are in law not compellable to pay in the facts of this case, but we find it impossible to hold otherwise consistently with our law, as we understand it. We accordingly, with all deference, feel constrained to allow the appeal from what Swift J. has decided.

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(1) [1921] 3 K. B. 327.
(2) [1927] 2 K. B. 311.
(3) [1933] 1 K. B. 822.
(4) [1936] 1 K. B. 169.
(5) [1933] 1 K. B. 837.

Appeal allowed.

The cross-appeal in which the plaintiff claimed a new trial on the ground of misdirection of the jury was afterwards heard on April 6 and 7, 1937, and dismissed.

Solicitors : *Sutton, Ommanney & Oliver ; Soames, Edwards & Jones.*

H. C. G.

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March 16, 17.

THE KING *v.* CORNWALL COUNTY VALUATION COMMITTEE AND OTHERS.

Ex parte FALMOUTH RATING AUTHORITY.

SAME *v.* SAME. *Ex parte* SAME.

Rating — County rating — Valuation — Proposal by county valuation committee for increase—Right to proceed in parts of county successively—Uniformity of assessment—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 18, *sub-s.* 2; *s.* 37, *sub-s.* 1.

The Rating and Valuation Act, 1925, provides:—

Sect. 18: "(1.) For the purposes of this Part [Pt. II.] of this Act there shall be established in every county a committee of the county council (to be called 'the county valuation committee') . . . .

"(2.) It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, ..."

Sect. 37: "(1.) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force . . . . may make in manner provided by this section a proposal for the amendment of the list . . . .":—

Held, that on the true construction of these provisions the county valuation committee, in carrying out the duty imposed upon it by s. 18, sub-s. 2, of promoting uniformity of valuation in the county, were not bound to make proposals for the correct valuation of all the hereditaments in the county at the same time, but might in the exercise of their discretion proceed by instalments and make proposals for the correct valuation of the hereditaments or some of them in parts of the county in succession; and consequently:—

Where in several areas of a county the prevailing valuations were too low, and the county valuation committee made proposals for the correct valuation of a large number of hereditaments in one of the areas only, and the assessment committee determined many of these proposals and in particular made an order increasing the gross and rateable value of one hereditament:—

Held, that the rating authority for that area was not entitled to obtain either a writ of certiorari to quash the order of the assessment committee, or a writ of prohibition to prevent the county valuation committee from making or the assessment committee from determining and enforcing any other such proposal, on the ground that any such proposal made by the county valuation committee in regard to part only of the county must be made in disregard of its statutory duty to promote uniformity of valuation in the county.

Double v. *Southampton Assessment Committee* [1922] 2 K. B. 213, not applicable.

Decision of the Divisional Court [1937] 1 K. B. 493 affirmed.

APPEAL from a decision of the Divisional Court (1) discharging two orders nisi, the one for a writ of certiorari and the other for a writ of prohibition.

The second quinquennial valuation list for the rating area of the borough of Falmouth, in the county of Cornwall, came into force on April 1, 1934, and the third list would come into force on April 1, 1939.

On January 28, 1935, the county valuation committee of the Cornwall County Council passed a resolution approving the report of a sub-committee stating that in ten rating areas in the county many valuations appeared to be too low, and expressing the opinion that in order to obtain more uniformity of valuation it was essential that the work of increasing these valuations should be done as soon as possible.

In April, 1936, the county valuation committee made proposals to amend the valuation list for the rating area of Falmouth in respect of the assessment of 3795 hereditaments therein consisting of houses and shops and representing 83 per cent. of those classes of property in Falmouth.

In June, 1936, the West Cornwall Assessment Committee determined, in respect of 118 of these hereditaments, proposals by which the county valuation committee sought to raise the total gross values by 73 per cent.; and in June and July, 1936, the assessment committee further determined proposals in respect of 210 more of these hereditaments, including a hereditament in the occupation of Mr. W. Manuell, the gross value of which was increased from 28*l.* to 48*l.*

No appeal from the decision of the assessment committee in respect of that last mentioned hereditament had been made to quarter sessions.

The county valuation committee had made no proposals for the amendment of the valuation lists for any of the other rating areas in the county pursuant to their resolution of January 28, 1935.

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(1) [1937] 1 K. B. 493.

If the valuation list for the rating area of Falmouth was amended as proposed by the county valuation committee, the total rateable value of the 3795 hereditaments would be increased from 75,155*l.* to 118,574*l.*, an increase of 43,419*l.*, and that increase would take effect as from April 1, 1936. The half-yearly rate for county expenses was 3*s.* 4½*d.*, so that if these proposals were adopted the occupiers of those hereditaments would have to contribute an additional 7327*l.* towards county expenses during the half-year.

On July 20, 1936, the Falmouth Corporation, being the rating authority for that borough, made an application to the High Court for an order nisi calling upon the West Cornwall Assessment Committee to show cause why a writ of certiorari should not issue to remove into the High Court the decision made by that committee on the proposal of the county valuation committee to increase the assessment of the hereditament occupied by W. Manuell as above mentioned on the grounds: (1.) that the county valuation committee in proposing increases in assessments of any dwelling-houses or shops in a part only of the county of Cornwall was contravening its statutory duty to promote uniformity in the principles and practice of valuation and was taking steps calculated to produce the opposite effect; (2.) that the assessment committee if it gave any effect to the said proposals of the county valuation committee would be imposing an unfair and unequal burden upon ratepayers in the borough of Falmouth in respect of county expenses.

On the same date the Falmouth Corporation as such rating authority made an application to the said Court for an order nisi calling upon the said county valuation committee and the said assessment committee to show cause why a writ of prohibition should not be awarded to prohibit the county valuation committee from proceeding with, and the assessment committee from hearing or determining, any proposal by the county valuation committee for increases in assessments of any dwelling-houses or shops in the borough of Falmouth until the county valuation committee lodged and proceeded with similar proposals taking effect in the same half-year in relation to all similar hereditaments in the county which in the opinion of the county valuation committee were under-assessed, on the same grounds on which the order nisi for a certiorari had been obtained.

These applications were supported by an affidavit made by Mr. Ivor J. W. Corlyon, the borough treasurer and rating officer for Falmouth, in which he stated the above mentioned facts, and further alleged (inter alia) that if the county valuation committee took steps to re-assess all rating areas in Cornwall with effect from April 1, 1936, there would be no discrimination against Falmouth and Falmouth would not be liable for more than its fair share of county expenses; that resolutions and letters of the county valuation committee exhibited to the affidavit showed that it was the intention of that committee to spread the process of re-assessment over a period of at least three years and unless and until that process was completed the ratepayers of Falmouth would continue to pay an undue proportion of county expenses as compared with ratepayers in other parts of the county; that the Falmouth rating authority had been advised and believed that the effect of the action of the county valuation committee in requiring the re-assessment of Falmouth without at the same time requiring the re-assessment of the other rating areas in the county of Cornwall which had been assessed on the same basis as Falmouth, and the action of the West Cornwall Assessment Committee in making a re-assessment by amending the Falmouth valuation list, was to make that list unfair and bad in law and that such proposals were themselves bad in law; and that unless the county valuation committee could be prevented from pursuing the course which they had indicated, the Falmouth rating authority would be compelled in defence of the ratepayers in their area to serve and proceed with proposals to make similar increases in the assessments in every other rating area in the county.

The applications were also supported by an affidavit made by Sir H. Trustram Eve, a fellow of the Chartered Surveyors'

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Institute, and a past president of the Rating Surveyors' Association, in which he said (inter alia) that he had appeared for the Falmouth rating authority when the West Cornwall Assessment Committee heard and determined the batch of 118 proposals made by the county valuation committee, and gave the evidence and advanced the contentions to that committee which in his affidavit thereafter appeared; that before appearing before the assessment committee he had ascertained that the method of valuation adopted by the county valuer was to apply a basic price to the "reduced covered area" of each hereditament, the reduced covered area of a two-storey house being ascertained by measuring the area covered by the building and multiplying by two, and that that method of valuation was used in many parts of the country for the valuation of the class of property the subject of the proposals in question; that he had also investigated the standard of valuation adopted by rating authorities and assessment committees as shown in the second valuation list for the rating areas of Falmouth and nine other boroughs in West Cornwall; that the standard of valuation in Falmouth was no lower than in these other rating areas and that there was uniformity of valuation throughout these areas; that the county valuation committee had decided that it was "preferable administratively" to revalue the county area by area spread over a number of years, and that they were therefore abrogating their statutory duty to promote uniformity for reasons of administrative convenience; that they took no steps during the preparation of the second valuation list to have that new basis of valuation adopted throughout the county; that if they wanted to raise the standard of valuation they should by conferences with rating authorities and assessment committees arrange for the adoption of that new standard of valuation during the preparation of the third valuation list which all rating authorities would have to begin in 1937 in order to bring the new lists into force on the statutory date April 1, 1939; that, alternatively, if the county valuation committee did not wish to achieve a new standard of valuation by the methods suggested in s. 18, sub-s. 2, of the Rating and

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Valuation Act, 1925, and insisted on doing the work of revaluation which should be done by rating authorities, they should make proposals throughout the county during the same rate period so that the revaluation would take effect everywhere as from the same date; that there was no practical difficulty in revaluing a whole county at one time, and that in his (deponent's) experience it was cheaper to do so than to use a small staff and spread the process of revaluation over a series of years; and that, if the plans of the county valuation committee were not modified, the extra and unfair burden which would be placed on Falmouth would make it necessary for the Falmouth rating authority to ensure that the new level of assessment was applied in all the other areas at the same time as in Falmouth, which would be a more onerous task than should be forced on any rating authority.

The High Court made the orders nisi applied for.

On December 8, 1936, the orders nisi came before the High Court for argument.

On the argument of the orders nisi an affidavit of Mr. N. Gasson, county valuer to the county valuation committee, was read on behalf of that committee, in which he stated that during the past nine years he had on the instruction of that committee constantly drawn the attention of the assessment committees and rating authorities in the county to the need of making correct and uniform assessments in accordance with law, and to the fact that correctness and uniformity could only be obtained if these authorities applied justly to each and every hereditament in their areas the definition of gross value or net annual value set out in the Act of 1925; that he contended before the assessment committee that that committee were not concerned with the present or future policy of the county valuation committee, but only with the correctness or otherwise of the assessments before them, and that their duty was to determine the correct gross value or net annual value of each individual hereditament in accordance with law.

An affidavit of Mr. Thomas A. H. Sheers, the clerk of the Cornwall County Council, was also read on behalf of the

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same parties, in which he stated that on October 30, 1931, on the instructions of the county valuation committee he had sent a circular to the five assessment committees in the county and through them to the rating authorities asking them to apply in practice justly and carefully the statutory definitions of gross value and net annual value; that on October 25, 1932, on the instructions of the said committee he had sent a circular letter to the assessment committees and the rating authorities in the county informing them that uniformity should be obtained by correcting inaccuracies rather than making inaccurate assessments; and that the county valuation committee had sought and was seeking to promote uniformity of assessment in the county by taking steps to make existing assessments conform to the standards provided for by the statutory definitions of gross value and net annual value in cases in which existing assessments did not conform to these standards.

The Divisional Court (Lord Hewart C.J., Swift and Macnaghten JJ.) discharged both the orders nisi on the ground that the county valuation committee had in no way exceeded their authority. On the contrary, the committee were proceeding by well-considered steps and appropriate instalments to the accomplishment of their task of promoting uniformity in the principles and practice of valuation in the large area with which they were concerned.

The Falmouth rating authority appealed. The appeal was heard on March 16 and 17, 1937.

Comyns Carr K.C. and *J. Scott Henderson* for the appellants. By seeking to have the valuations for rating purposes raised in Falmouth, which is one of the rating areas in Cornwall where many valuations are too low, and leaving the other areas to be dealt with later, a lack of uniformity of rating will be created during the intervening period. That the valuation committee should make proposals to bring this about is a breach of their duty under the Rating and Valuation Act, 1925, s. 18, sub-s. 2. For by sub-s. 2 of s. 18 it is the duty of every valuation committee to take steps for promoting "uniformity in the principles and practice of valuation." There is no evidence of any disparity in the lowness of the valuations at the present time. It is not said that the new values fixed for property in Falmouth are incorrect, but that as a result of them Falmouth will have to pay an undue proportion of the rate for county expenses. The objection is to the making of the increase of assessable values piecemeal.

[ROMER L.J. The valuation committee has started by proposing correct values for Falmouth with a view to making the values correct ultimately for the whole county.]

The appellants' complaint is that the correct values for the county are only to be obtained "ultimately." The whole ground of complaint rests on the time factor. In *Stirk & Sons* v. *Halifax Assessment Committee* (1) a percentage increase of rates in an area was quashed because a separate discretion ought to have been exercised in respect of each hereditament.

In *Double* v. *Southampton Assessment Committee* (2) it was held that the alteration of the valuation of certain hereditaments only in a single rating area rendered the valuation list unreasonable and unfair, with the result that the Court quashed it. At that time the question could only arise in one rating area, and there was then no county valuation committee.

[ROMER L.J. What is it that confers the right to intervene when valuations are unfair or incorrect ?]

Originally it was the Union Assessment Act, 1862, s. 18, the words of which are reproduced in ss. 36 and 37 of the Rating and Valuation Act, 1925 ; but by s. 37 the county valuation committee was given a right to make a proposal for the amendment of the list. That committee was only brought into existence by s. 18, sub-s. 1, of the Act of 1925.

This case is exactly like *Double's* case (2), except that in *Double's* case (2) the unfairness was within the union and here it is within the county.

[SCOTT L.J. The assessment committee for one area are not concerned with assessments in another area.]

No, but the valuation committee have a duty to obtain

(1) [1922] 1 K. B. 264.

(2) [1922] 2 K. B. 213.

uniformity of values throughout the area. It is true that they seek to achieve ultimate correctness and uniformity, but by proceeding too slowly they are creating an injustice meanwhile. The Falmouth rating authority could make proposals to correct the valuations all over the county, but this would involve them in great expense in doing the work of the county valuation committee for them. It is for this reason that relief is sought directly against the valuation committee. It is not as if there would be any difficulty in making the proposals for correct assessments over the county at the same time. They only have to put in proposals, and then, when these were ultimately dealt with, the increased values would relate back to the dates of the proposals: see s. 37, sub-s. 10. A general notice can be served objecting to all existing values.

Cases decided since the 1925 Act came into force are *Ladies Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee* (1) and *Lilley & Skinner, Ld.* v. *Essex County Valuation Committee.* (2) They show that a particular ratepayer is not entitled to complain of a correct assessment on the ground that it is too high in relation to assessments of other property. There the wrong remedy was pursued, and it is contended that the proper remedy is that which has been resorted to here. The whole issue here is as to the time factor, just as it was in *Double's* case. (3) The Court should allow these appeals.

F. J. Tucker K.C. and *G. D. Squibb* for the county valuation committee. This case really fails on the facts, because the documents in the Case show that there was an existing lack of uniformity throughout Cornwall, and there is nothing to show that the steps the valuation committee are taking will increase the lack of uniformity, while their object undoubtedly is to obtain correctness and uniformity of rating. The valuation committee are therefore doing their duty under s. 18 and exercising the discretion conferred thereby as to the way they seek to achieve uniformity. Further the whole inference from the facts is that there was a lack of uniformity in Falmouth

(1) [1932] 2 K. B. 679.
(2) (1935) 153 L. T. 64; 51 Times L. R. 432.
(3) [1922] 2 K. B. 213.

which they are taking steps to correct. In any case the valuation committee are honestly exercising their discretion, and the Court will not interpose in these circumstances having regard to s. 37, sub-s. 2. Lastly, it is contended that these proceedings do not lie against the valuation committee. In any case the Court is asked not to say that the proceedings would lie.

Comyns Carr K.C. replied.

LORD WRIGHT M.R. This is an appeal from a decision of the Divisional Court, who have discharged two rules nisi which came before them. The circumstances in which the dispute arose are these. [His Lordship stated the facts.]

It is said, therefore, that if the valuations of the particular hereditaments in Falmouth which have been proposed by the valuation committee are acted on and the assessments increased by the assessment committee the total amount of rates chargeable to ratepayers in Falmouth will be very seriously increased; that this will involve an inequality or a want of uniformity affecting the ratepayers in Falmouth as compared with the ratepayers in other rating areas in Cornwall; that the valuation committee in taking the course which they have taken are acting ultra vires, because they are acting contrary to the statutory duty imposed on them to establish uniformity as between all the ratepayers in all the different rating areas in Cornwall; that the valuations for Falmouth, if put up in accordance with the revised valuations, will be on a higher standard than the existing valuations in other parts of the county, which are admittedly too low; and that these valuations will contravene the principle of uniformity. For these reasons it is contended that the valuation committee have no jurisdiction to make the proposals for the increased valuations put forward, and equally that the assessment committee have no power to act on them, and accordingly that the writ of prohibition should issue. The case of certiorari is somewhat more limited, but it depends on the same principle. It is said that the particular decision in question was arrived at on a proposal made by the county valuation committee which was ultra vires and must be disregarded.

At the outset it may be observed that these propositions are somewhat difficult to follow. I do not stop to consider—the point has not been argued—whether prohibition or certiorari is on any view a competent procedure in the case of such a body as the county valuation committee. I might further point out that there is no suggestion here that the particular valuations are in themselves improper or excessive, or such as ought not to be accepted. I do not know that there is any admission that they are in themselves correct, but the contrary is not contended, and the case here proceeds on that basis. So, too, I do not dwell on the very serious form of the rule nisi for a writ of prohibition which is such that, if it were made absolute, it would prevent the assessment committee from proceeding to deal with assessments until the valuation committee had proceeded with similar proposals for the same half-year " in relation to all similar hereditaments in the county of Cornwall which in the opinion of the said county valuation committee are under-assessed." The reference to the opinion of the county valuation committee is very noticeable. But putting aside these minor points the essential feature to be observed is that the county valuation committee are not in any sense a judicial body. They are simply and solely an administrative body which has certain specific duties imposed on it, duties which work in with the general system of rating and valuation under the Act of 1925. The judicial body is the assessment committee. That committee have judicial duties in connection with the final settlement of the valuation list, which is prepared by different rating authorities, which is subject to objections, and which may be subject to investigation and decision on the part of the assessment committee.

The functions of the valuation committee are much more limited. To see what they are it is necessary to look at s. 18, sub-s. 1, of the Rating and Valuation Act, 1925, which provides for the establishment in each county of a committee of the county council, called the county valuation committee, consisting of members of the council appointed by the county and a representative of the assessment committee for each assessment area nominated by the assessment committee. The duties of this body are " to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions "—that is to say, assisting them in the preparation and settlement of the valuation list and, I suppose, the fixing of the rate. The section goes on, " for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference."

So far then there is a general power or duty in the committee to take such steps as the committee think fit for the purpose of promoting uniformity and assisting rating authorities and assessment committees. Thus far it appears that their functions are advisory, but they are to act for these purposes, taking a wide view and looking beyond the ambit of any particular rating authority, or indeed their own county. Certain more particular powers and duties are then vested in them. Sub-s. 3 provides: " A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee, or other county valuation committee, appear as a party to any objection or appeal under this Part of this Act." By s. 26, which belongs to the portion of the Act dealing with the preparation of valuation lists, it is provided: " (1.) Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list, or by the insertion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may in accordance with the provisions of this Part of this Act lodge an objection with the assessment committee." That provision is dealing with the preparation of the list for

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each quinquennial period. Sect. 37 deals with the revision of current lists, and it is that section which is peculiarly apposite here because the present questions have arisen with reference to a revision. Sect. 37 states: "(1.) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list." The mechanism is then set out, and the proposal, if objected to, is to be heard and determined by the assessment committee as if it were an objection to the draft list. I shall only refer to two more sections. Sect. 38 gives rating authorities, assessment committees, and county valuation committees power to employ, among other persons, a competent person to give advice or assistance in connection with the valuation of hereditaments, and by s. 55 rating authorities, assessment committees, and county valuation committees may appoint "for the purposes of this Act such rating officers, valuation officers, and other officers as they think fit." It was under s. 55, no doubt, that the valuation committee in the present case appointed their valuer and additional valuers.

In those circumstances it seems to me that what the valuation committee have been doing in this case is simply, according to the best of their judgment, to fulfil the duties under the various sections which I have stated. There is no suggestion that they are not acting bona fide, and there is no suggestion that any of the actual valuations which they have made so far, or which have been proposed to, or settled by, the assessment committee are in themselves wrong. The whole gravamen of the complaint on the part of the Falmouth council is that nothing can be done in these matters unless that which is done is done simultaneously over the whole county of Cornwall. It is said, still assuming the proposals put forward are unexceptionable and are made in good faith, that Falmouth cannot be dealt with by itself or at all until the whole of Cornwall is dealt with. The whole gravamen of this complaint, as I understand it, is based on the time factor. It is said that there must be a want of uniformity and fairness if, as a result of proposals made, as they have been, and are being, made, by the valuation committee, Falmouth is revalued, however correctly and properly, so that the new valuation comes into effect before the new valuation which is contemplated comes into effect in the remaining areas of Cornwall. It seems to me that although there is a certain force in the complaint that one part cannot be fairly revalued so as to put up the values until all the parts are treated alike, and although it may be true that that procedure may involve for a time some want of uniformity and fairness as between the different areas of the county, still, in my judgment, that does not justify the application which has been made here. I think that the course which has been taken by the county valuation committee is honestly directed to the fulfilment of the functions set out in the different sections which I have read, and every step is in accordance with the requirements of the statute.

That being so the actual mode of procedure must, I think, at least in all the respects which are relevant in this case, be left to the discretion of the county valuation committee as an administrative body. They are not deciding judicially what the valuations should be; they are merely taking the appropriate steps to obtain, as expeditiously as they can, the revaluation in the interests of uniformity of the various hereditaments over the whole area of Cornwall. They have taken certain measures which I have referred to with the object of lodging the different proposals which flow from the valuations as and when they are effected, and it is, I think, entirely for them to decide what is the most convenient and appropriate method of achieving the result of uniformity. I do not think that this Court has any right at all to interfere by these prerogative writs with the discretion of the valuation committee in carrying out their statutory duties. There may perhaps be cases in which something has been done which is ultra vires and beyond their jurisdiction having regard to the terms of the Act, but I do not find in this case anything of that character, and putting aside all questions as to the propriety of this proceeding as such, I think on the merits that the order of the Divisional Court discharging the rules nisi was right and should be affirmed.

The case of the writ of certiorari is, I think, simpler than that of the writ of prohibition. The effect of the certiorari, if the rule were made absolute, would simply be to discharge a valuation which in itself was quite unexceptionable, and to discharge it because there are other valuations which are not correct in other parts of Cornwall and to do so, as I have already said, on the ground that it was based on a proposal made by the county valuation committee which was unlawful and ultra vires and, therefore, could not form the basis of a valid decision by the assessment committee. The same consequences must, I think, follow as in the case of the rule for prohibition. I agree in all respects with the very clear and complete judgment of the Lord Chief Justice in this case, and indeed I might have been content to accept his judgment.

I ought, perhaps, to refer to certain authorities which have been cited, but I am bound to say that they do not seem to me to bear at all on the question to be decided here. They deal with other quite distinct matters, not with the actions of an administrative body but with the decisions of judicial bodies—namely, assessment committees. Such a case is *Stirk & Sons, Ld.* v. *Halifax Assessment Committee* (1), where a rate was objected to on the ground that it did not involve a particular valuation of the various hereditaments but merely applied a sort of general increase without any regard to the merits of the particular cases, and it was said that such a procedure could not be justified on any ground of discretion. As Branson J. said (2): "It has been urged upon us that the Assessment Committee has a free and unfettered discretion under the statute to make its list according to the best of its ability. I think that is true, but the Committee has fallen into the error which has been made by other people who have a general discretion; instead of exercising its

(1) [1922] 1 K. B. 264.

(2) Ibid. 274.

discretion, as it should do, in relation to particular hereditaments, it has fettered that discretion by making a general rule, and has sought to apply to a number of hereditaments, which must be subject to all sorts of varying considerations, the one inflexible rule that the value is to be deemed to have risen by 25 per cent." That decision does not, I think, throw any light on the present case.

Double v. *Southampton Assessment Committee* (1) was very strongly relied on. There was in that case undoubtedly a case of inequality due to what I may call the time factor. It related to a valuation within a particular parish of the different licensed houses. Certain of those licensed houses were revalued, but the process of revaluation stopped for various reasons and the poor rate of the parish was made on the basis of the amount at which certain premises had been revalued and that of the value of other premises without a revaluation. It was a case of a supplemental list, and the result was that with regard to that particular rate the occupiers of the licensed houses which had been revalued—the revaluation having been by way of increase—had to pay more by way of rates than the occupiers of the other houses to which the process of revaluation had not reached. It was held that the result was to cause inequality and unfairness and that the assessment committee had no power to discriminate between properties of the same class. The question there arose in the ordinary course by one occupier objecting to the rate and appealing from the assessment committee to quarter sessions and having a case stated. The decision was that the rate was unequal and could not be enforced and should be reduced. That is no authority for such a proceeding as is brought here against the valuation committee, because they are not a judicial authority but merely an administrative body carrying out their duties in the way which I have indicated.

The decision in *Ladies Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee* (2) certainly does not, in its general effect, help the appellants here, nor, as I think, do any of the passages relied on aid the appellants' argument. The

(1) [1922] 2 K. B. 213.

(2) [1932] 2 K. B. 679.

appeal there was against a particular assessment on particular premises. The respondents were the West Middlesex Assessment Committee and the complaint by the occupiers was that they had been assessed at a higher rate than other premises of the same class. It was not suggested that they had been over-assessed or that the assessment was incorrect, and the sole basis was that there was an unfairness in the respect which I have stated. The Court of Appeal held that this was irrelevant. The only question in that proceeding was whether or not the assessment was in accordance with the statute. There were, no doubt, other proceedings open for correcting, by appropriate steps, the assessment of the hereditaments which were said to be incorrectly assessed, and it was in that connection that Scrutton L.J. said (1): " Evidence, however, as to the application of different principles of assessment, as between comparable classes, or different parts of the same classes, may, of course, be of importance on the question whether the valuation list is fair and uniform." That is a long way from justifying the proposition that this Court has any right to interfere in such circumstances as the present with the discretion of the county valuation committee.

The later decision of *Lilley & Skinner, Ld.* v. *Essex County Valuation Committee* (2) is substantially to the same effect. I would only notice that there the assessment committee, in revaluing the premises and settling the assessment, had proceeded on a proposal of the Essex County Valuation Committee to amend the current valuation list. I do not find that it was said anywhere in that case that the proposal was a nullity or something on which the assessment committee were not entitled to proceed.

I think that the appeal should be dismissed, with costs.

ROMER L.J. I agree so thoroughly with the judgment which has just been delivered and with the judgment of the Lord Chief Justice in the Divisional Court that I have very little to add. In the few observations which I have to make I would like, first, to look at the matter from the point of view

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(1) [1932] 2 K. B. 690.

(2) 51 Times L. R. 432.

Romer L.J.

of the assessment committee. Supposing that in the Falmouth area every dwelling-house except one was under-valued, no one, I suppose, could doubt that the owner of the one would be a party aggrieved within the meaning of s. 37, and could apply to the asssessment committee to have the valuations of the other dwelling-houses in the area raised to the proper level. I can find nothing in the Act which even remotely suggests that in such a case the assessment committee would be under any obligation to decline to deal with the matter unless and until the party aggrieved had taken the necessary steps in every other area in the county to see that there was uniformity of valuation throughout the whole of the county of Cornwall. Of course, if the person alleging himself to be aggrieved turned out to be a person who had not the necessary power or the status to make a proposal under s. 37, any alteration of the list made, or proposed to be made, by the assessment committee would be subject to proceedings either in certiorari or prohibition respectively. Whether proceedings could be taken in such a case against the county valuation committee is a question upon which I express no opinion. That being so, it seems plain that the only question in the present case is whether the county valuation committee had power to make the proposals they made to the assessment committee. It is said by Mr. Comyns Carr that they had not, for this reason, that their duty, or one of their duties, at any rate, is to secure uniformity of valuation throughout the county, and that the steps which they have been taking, so far from securing uniformity, will result for some considerable time, it may be five or six years, in a complete lack of uniformity throughout the county. It is, however, to be observed that by s. 18 the Legislature has said that, for the purpose of exercising the powers given to them by the section, every county valuation committee shall take such steps as the committee think fit for promoting uniformity. It cannot be denied, and, indeed, it is not denied, that in the present case the valuation committee are proceeding bona fide in their desire to secure uniformity of valuation throughout the county of Cornwall. But they have decided on steps which do not commend themselves to the Falmouth Borough Council and the council's advisers. There is no doubt that the late Sir Herbert Trustram Eve was a very great authority, none greater, I dare say, on such questions as the valuation of properties for rating purposes. And if his advice had been taken and followed the county valuation committee would not have proceeded on the present lines. But they have bona fide come to the conclusion that, for the purpose of securing ultimate uniformity of valuation throughout the county, these are the best and most practical steps which they can take, even though the result may, and probably must, be to cause a lack of uniformity for some years. That being so, and seeing that the county valuation committee are the body to determine what steps are to be taken for the purpose of securing uniformity, and that they have acted bona fide in reaching their decision, it is impossible, I think, for this Court to interfere, even if the Court came to the conclusion—I will not say that I have come to that conclusion—that the steps advocated by Sir Herbert Trustram Eve would have been better or more practical in the circumstances.

I agree that this appeal fails and must be dismissed.

SCOTT L.J. I agree. I only want to add for myself that I express no opinion on the question whether the writ of prohibition lies against the county valuation committee at all, and further whether that writ, or the writ of certiorari, lies against the assessment committee in the circumstances of this case.

It seems to me on the merits of the case that the appellants have not taken sufficient account of the direct statutory duty imposed by s. 22 and other effective sections of the Act of making a correct valuation list or, by s. 37, of correcting a valuation list which is incorrect. The duty of making a valuation in accordance with the standard of valuation prescribed by the Act is a positive duty. In my view, the argument for the appellants here assumes that there is an overriding positive duty modifying the first positive duty laid on the county valuation committee and also on the assessment committee to see that no correction of an existing list is made unless there is uniformity established throughout the whole county. I see no ground for taking that view. I therefore agree entirely with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., Speechly, Mumford & Craig, for the County Solicitor, Truro.*

H. C. G.

Considered. TINSLEY *v.* DUDLEY [1951] 2 K. B. 18

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ASHBY *v.* TOLHURST.

Motor-car—Parking on private ground—Car Park Ticket—Conditions as to all cars being left in all respects at the owner's risk—Car taken from parking ground by thief—Negligence of attendant—Licence to park—Contract of Bailment—Liability for damages.

The owner of a motor-car left it on a private parking ground, and on payment of 1*s.* received from the attendant a ticket headed " Seaway Car Park, Car Park Ticket " and containing a receipt for 1*s.*, followed by the provision : " The proprietors do not take any responsibility for the safe custody of any cars or articles therein nor for any damage to the cars or articles however caused . . . . all cars being left in all respects entirely at their owners' risk." Later when the owner returned for his car the attendant told him he had just given it to the owner's friend. The man who had so obtained the car had neither the ticket nor the key to the car, which was locked ; but he was able to get his hand through the windscreen and free the car. The car was never recovered, and the owner brought these proceedings against the proprietors of the car park for damages. The negligence of the attendant was admitted, but liability denied :—

Held, (1.) that the relation between the proprietors and the owner of the car was that of licensors and licensee, and therefore that the proprietors were under no liability whatever in regard to the car ; (2.) that what had been done by the attendant did not amount to a misdelivery of the car ; (3.) that even if the relationship between the parties was such as to constitute a contract of bailment and the act of the attendant amounted to a misdelivery of the car, the conditions on the ticket relieved the proprietors of all liability ; (4.) that no term could be implied in the contract (if any) between the parties that the car should not be parted with without production of the ticket.

APPEAL from a decision of his Honour Judge Beazley sitting at Southend County Court.

The defendants were the owners of a car park called Seaway Car Park at Southend, and on August 25, 1936, the plaintiff left his car there, and on payment of 1*s.* to the attendant received a ticket torn from a book of receipts headed " Seaway Car Park, Car Park Ticket." Then followed spaces where the date and the registered number of the car were inserted and afterwards there was printed " Received 1*s.* The proprietors do not take any responsibility for the safe custody of any cars or articles therein nor for any damage to the cars or articles however caused . . . . all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required." Then followed a space for the signature of the attendant, but the ticket handed to the plaintiff was unsigned. According to the plaintiff's evidence he returned later in the day with Mr. Squires to have a rest in his car. The car was not there and the attendant asked him if he was looking for his car, and when the plaintiff replied "Yes," said that he had just given the car to the plaintiff's friend. The plaintiff said he had no friend in Southend except the one with him, and asked the attendant why he had given up the car without production of the ticket. The attendant said that the plaintiff's friend said he wanted to ride just to Thorpe Bay, that the plaintiff knew all about it, and that if the plaintiff returned before the car was back he was to wait for it. The plaintiff called in a police constable and left the matter with him. He said that the car park was in the shape of a triangle with two sides open, that he had locked the car before leaving it, but that access could be obtained by putting a hand through the windscreen. The attendant said that this was how the car had been taken. Mr. Squires was called to confirm the plaintiff's account of what happened. The car was never found, and the plaintiff brought these proceedings against the defendants for damages.

No evidence was called by the defendants, who admitted the deposit of the car and that the attendant had been negligent, but denied liability.

The county court judge in giving a reserved judgment said that the plaintiff sued the defendants for alleged breach of contract in the care and custody of his motor-car and, alternatively, for the conversion of the car to their own use. The defendants denied liability, and relied upon the conditions contained in the receipt. It was argued on behalf of the plaintiff that the handing over of the car by the defendants' servant to a stranger without production of the ticket was a conversion by misdelivery; that the words "owners' risk" imported some liability and that the proprietors could not divest themselves of the position of bailees; and that in the circumstances the conditions of the receipt did not exempt the defendants from liability.

On behalf of the defendants it was argued that the contract was not one of bailment and that its terms were contained in the receipt, which recorded the relationship of the parties as one of licensor and licensee on the terms contained in the conditions, with the result that they were exempted from liability.

In his opinion the contract between the parties was one of bailment for reward upon the terms contained in the receipt. In his view the words "the proprietors do not take any responsibility for the safe custody of any cars" did not alter the nature of the contract.

On the next question, whether, in the circumstances, the conditions of the receipt exempted the defendants from liability for the loss of the car, in his view the effect of the words in the receipt was (1.) to protect the proprietors from liability for any loss in relation to the car while it was in their custody; (2.) to imply a term that they would keep the car in their custody at any rate to the extent that they would not hand the car over to any one except on production of the ticket. Accordingly by handing over the car without production of the ticket they were committing a breach of the implied term of the contract.

Further, their act was outside the contract and was an act of conversion, and the conditions could only protect the defendants while they were carrying out their contract. In handing over the car as they did they broke the terms of the contract by their own act and were therefore not entitled to rely on the conditions. Even if there was only a licence the same reasoning would apply. If he was wrong in this view then the conditions protected the defendants.

Judgment was then given for the plaintiff for 30*l.* 14*s.* damages.

The defendants appealed. The appeal was heard on May 5 and 6, 1937.

Percy Lamb for the appellants. The plaintiff must be taken to have left the car on the parking ground at his own risk and to have paid only for a licence to do so, so that no liability was imposed on the proprietors of the car park. The county court judge was wrong in implying a term that the car was only to be given up on production of the car park ticket. The ticket is a mere receipt for 1*s.*, and apart from the conditions endorsed on the tickets, they were issued merely for a check on the attendant. There is no ground for treating the relation between the parties as that of bailor and bailee. If the thief had merely gone on to the land and taken the car, this action could scarcely have been brought. But it is said that in view of the act of the attendant there was conversion by misdelivery. The attendant's negligence was admitted, but not that there was conversion or a contract of bailment. In any case the liability for the attendant's negligence depends on there being a contract between the parties imposing the duty to take care. Here there was a mere licence and no such contract.

But if, on the true view, there was a contract of bailment, the conditions on the ticket suffice to relieve the defendants from all liability: see *Rutter* v. *Palmer* (1) and *Gibaud* v. *Great Eastern Ry. Co.* (2) *Skipwith* v. *Great Western Ry. Co.* (3) closely resembles the present case, for there was actual misdelivery, and yet the railway company was relieved from liability. In all those cases there was a contractual obligation for safe custody and then provisions qualifying that obligation.

[SIR WILFRID GREENE M.R. Here the conditions on the ticket negative the existence of liability for safe custody.]

Yes, and their effect is to show that a car left at the car park never comes into the defendants' custody. In other words, there was no contractual liability but only a licence. But the cases cited show that even if there was a contractual liability the conditions suffice to exclude liability.

If there be a contract at all, it is a contract of bailment, and in such a case the act of the bailee in dealing with the goods deposited inconsistently with the rights of the bailor is only conversion when an intention to interfere with the

(1) [1922] 2 K. B. 87.

(2) [1921] 2 K. B. 426, 434.

(3) (1858) 59 L. T. 520.

rights of the bailor is proved: *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll.* (1) There was no such intention here. The appeal ought therefore to be allowed, either because there was here a mere licence or because, if there was a contract of bailment, the loss of the car deposited by the negligence of the attendant in regard to the safe custody of the car imposes no liability on the defendants in view of the conditions on the ticket.

B. M. Cloutman for the respondent. The fundamental question here is, what was the relation between the parties? It is contended that there was clearly a contract of bailment or, at any rate, that there was sufficient evidence to entitle the county court judge to draw the inference that this was so. The defendants admitted the deposit of the car and the attendant's negligence. The admission of negligence connotes certain duties.

[Romer L.J. The admission is that if there was a duty that duty was not fulfilled.]

This is a very strong case. The car was placed on the defendants' ground and there were attendants on the ground, one of whom handed a ticket to the plaintiff on payment of 1s., and the negligence of this attendant in delivering the car to some one else was admitted. There was ample evidence then to justify the county court judge's inference that there was a contract of bailment. If there had been a mere licence there would be nothing for the conditions on the ticket to operate upon. It is inconsistent with the relationship of licensor and licensee that the defendants should require the protection of the conditions, but entirely consistent with the relationship of bailor and bailee. Further, on this view, the conditions are not enough to relieve the defendants from liability for the negligence of their servant: see *London and North Western Ry. Co.* v. *Neilson* (2), where Lord Dunedin referred with the approval to the view expressed by Scrutton L.J.: "If a carrier wishes to exempt himself from liability for the negligence of his servants he must do it in clear and unambiguous language."

(1) (1918) 118 L. T. 596.

(2) [1922] 2 A. C. 263, 271.

Again, the county court judge was right in holding that there had been conversion by misdelivery, and on the true construction of the ticket it did not free the defendants from liability for that. All the conditions of the ticket did was to relieve the proprietors of any need to have attendants on the parking ground, and when there were attendants, from any liability if the car was taken away without reference to them. But the conditions were no protection when the attendant handed over the car to some one other than the owner. This is a very strong case, because according to the evidence the attendant gave the car to an unauthorized person who had not the ticket and had not the key of the car, which was locked. In such a case there were sound reasons for holding that there had been conversion by misdelivery. Of course if the Court found that there was a licence to place the car on the ground and nothing more, the respondent cannot succeed. But it is assumed in this part of the argument that a contract of bailment existed. It is true that the ticket says that the car is left at the owner's risk, but that cannot mean anything but the risk of accidental loss. Such a risk as that the defendants' servant should give away the car to a stranger could not be contemplated. There is no protection for acts of misfeasance: *Travers* v. *Cooper* (1) and see *Smackman* v. *General Steam Navigation Co.* (2) and *Rutter* v. *Palmer.* (3) General words such as there are in the ticket do not give protection to a bailee who makes away with the property deposited. There were no clear words relieving the bailee from liability in respect of conversion. *Cordey* v. *Cardiff Pure Ice Co.* (4) shows that general words will not protect from such recklessness as there was here, in handing over a car to one who had no ticket and no key with which to open the locked car. Again, general words will not protect a bailee who acts so as to abandon the character of bailee, as was done here, by voluntarily parting with the car. In such a case the principle of *Lilley* v. *Doubleday* (5) applies, as was pointed out in *London*

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(1) [1915] 1 K. B. 73, 101.
(2) (1908) 13 Com. Cas. 196, 201.
(3) [1922] 2 K. B. 87, 91.
(4) (1903) 88 L. T. 192.
(5) (1881) 7 Q. B. D. 510.

and North Western Ry. Co. v. *Neilson.* (1) There are a number of old authorities to the same effect.

To sum up, the contract here is one of bailment, and the bailees are subject to the liabilities inherent in such a contract except in so far as they are protected by the conditions on the ticket. There can be no doubt that a bailee is under an obligation not to give away the subject-matter of the bailment to a stranger. The words of the conditions in the ticket are general words and not sufficient to give protection from liability in all circumstances. The words are appropriate to accidental loss and not to a case of conversion by misdelivery. The general words have sufficient effect given to them by relieving from the obligation not to be negligent, but the present case goes far beyond that. Lastly the bailees have lost the protection of the general words by giving away the subject-matter of the bailment.

Percy Lamb replied.

Sir Wilfrid Greene M.R. In this case the appeal arises in the following circumstances. [His Lordship stated the facts.] The learned judge has come to the conclusion that the relationship between the parties, constituted partly by conduct, partly by the terms contained in the ticket, was a relationship not of licensor and licensee, but of bailor and bailee. He has read into the contract an implied term to the effect that the owners of the park will not hand over the car save on production of the ticket. On this basis he decided the case in favour of the plaintiff, because he held there had been a breach of that implied undertaking. He also held that there had been a conversion.

The first thing to do is to examine the nature of the relationship between the parties, a matter upon which the character of the ground is, I think, not without importance; but the most important element is the document itself. It describes the place in which the car is to be left as a "car park," and the document is described as a "Car park ticket." I myself regard those words as being, in a real sense, the most important part

(1) [1922] 2 A. C. 263.

of the document, because they indicate the nature of the rights which the proprietor of the car is going to get. You take a car park ticket in order to obtain permission to park your car at a particular place, and parking your car means, I should have thought, leaving your car in the place. If you park your car in the street you are liable to get into trouble with the police. On the other hand, you are entitled to park your car in places indicated by the police or the appropriate authorities for the purpose. Parking a car is leaving a car and, I should have thought, nothing else. The right, therefore, which this document starts off by giving on its face is a right to park the car. It then proceeds to indicate that the owner of the car is not as a result to have claims against the proprietors of the park. It is said that the existence of these conditions indicates that the relationship is necessarily a contractual one, not merely that of licensor and licensee, but a relationship of bailment, because there would, it is said, be no necessity for excluding these liabilities unless the relationship was one which, prima facie, would import them. I cannot construe a document of this kind in that strict way. It seems to me that reading the document as a whole, including its own description of itself, namely " Car park ticket," it really means no more than this: the holder of this ticket is entitled to park his car in the Seaway Car Park, but this does not mean that the proprietors are going to be responsible for it. If that be the true construction of the document, and I think it is, the argument that the presence of these exempting conditions points to the view that they are inserted in order to remove a contractual liability which would otherwise be there disappears and, in my opinion, the argument, when applied to a document of this kind, is of no real weight. If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations on the part of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there.

There is one other way I think of testing the position, and that is to consider in whom possession of this car was at the relevant time. In doing that, of course, one has to be careful to see that one is not unconsciously begging the whole question ; but it would be a surprising result I think if the effect of the relationshp between these parties was that when the car was left on this piece of ground possession of the car in the legal sense became vested in the owners of the park. It would involve the consequence that the owners of the park could maintain an action of trespass to the car, and an action of conversion if their special property in the car was interfered with. As I say, that argument must not be used in such a way as to beg the question ; but it would be rather a surprising result if, when a man left his car on land like this and paid 1*s*. for the privilege of doing so, possession passed in a way in which it certainly would not pass if he left it in a public park in a square in London and paid the attendant 6*d*. for the ticket. In such a case possession, it seems to me, clearly would not pass ; I quite fail to see why possession should pass in a case such as this. That, as I say, is merely a way of looking at the matter and is not, of course, a conclusive argument.

It is said, contrary to that view, and I must deal with this branch of the argument, that the true relationship of the parties was that of bailor and bailee, but that the obligations which that contract would normally impose upon a bailee are cut down to the extent, and only to the extent, that the conditions prescribe. I find difficulty myself in seeing, when the conditions are truly construed, what there is left of the obligations arising under a contract of bailment when the obligations are cut out of it to which these conditions refer. But, assuming that there is the ghost, so to speak, of a contract of bailment left here one has to see what the conditions mean. I will read them again: " The proprietors do not take any responsibility for the safe custody of any cars or articles therein, nor for any damage to the cars or articles however caused, nor for any injuries to any persons, all cars being left in all respects entirely at their owner's risk." It is conceded by Mr. Cloutman that the ordinary obligations of a bailee in respect to the custody of the article bailed are excluded by those words. Those words would permit a negligent custody, they protect the bailee in a case where damage is negligently done to the car by himself or by his servant. Mr. Cloutman admitted that the contract would impose no obligation on the bailee to provide an attendant to look after the car and that it would impose no obligation on the bailee or his attendant, if he provided one, to take any active step whatsoever to prevent somebody from removing the car who had no title to remove it, even if it was done under the eyes of the bailee or the eyes of his attendant. If the bailee or his attendant standing a yard away from the car saw somebody who they knew had no title to do so removing it, they would be under no obligation whatever to move one finger to stop it. But Mr. Cloutman says this : although admittedly the conditions place the bailees in that favourable position the conditions do not protect them if they do some active step in the way of delivering the motor-car to somebody else. It is said that that is in this case what was done by the attendant. When this contention is examined it appears to me to rest on no sure foundation on the facts, because all that we have to differentiate the case from a mere standing by of the attendant and convert it into a case of a delivery by the attendant of the car consists in the evidence of the plaintiff in which he said that the attendant told him that he had given his car to his friend. On that rather slender foundation the whole of the argument for the respondent on this part of the case rests, because it is said that the word " give " imports that the attendant took some active step to place this thief in possession of the motor-car. I find it impossible to collect that meaning out of the words. The word " give " in the context quite clearly is not accurately used. The car is placed upon the ground, and if the owner came for it he would get into it and drive it away. There is no question of giving, no question of physical delivery coming into it at all. It is not like articles in a railway cloak-room which have to be handed out by the cloak-room attendant before the person claiming them can get them. This is a case where any one can walk on to the land and get into a car, and I cannot myself read that one phrase as evidence of any such delivery as Mr. Cloutman admits is essential for the success of his case.

But let me assume that I am wrong about that, and that there was such a delivery of possession as to amount, apart from the conditions, to a wrongful act and a breach of the contract. Then it becomes necessary to see whether the defendants are protected by the conditions against acts of that kind done by their employee. There is one aspect of this matter which has not been dealt with and, therefore, I do not propose to base any part of my judgment upon it; but if the argument be that this attendant did some act which amounted to delivery of possession I for myself do not see why the Court is to infer that the doing of any such act was within the scope of his authority. All we know about him is that he was put in the car park with a bundle of tickets and counterfoils in a book to receive money and to give receipts for it. I refrain from pursuing that matter further, because it is not one which has been raised hitherto. I will assume therefore that the attendant did have authority to deliver possession and that he did so obviously quite honestly under a mistake. Is the language of the conditions sufficient to protect the defendants? In my opinion it is wide enough to protect the defendants not merely in respect of the acts of third persons but in respect of the acts of their own servants. The opening words, "the proprietors do not take any responsibility for the safe custody of any cars or articles therein," would clearly cover the case where an attendant being put in the car park and instructed by the park owners to look after the safety of the cars negligently omitted to do so. It could not be suggested, and is not suggested, that that sentence would not protect the park owners. Taking the next limb, "nor for any damages to the cars or articles however caused," it could not be suggested, and indeed is not suggested, that those words do not cover the case of damage to the car through the negligent act of the park owners or their servants. It is interesting to observe while those words are under consideration that they are exactly the words, with the substitution of the word "injury" for "damage," which have been held to produce the effect which I have said.

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I need only refer to a passage in the judgment of Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (1), where he sums up the effect of the authorities and states the words, not exhaustively, of course, that have been held to be a protection against the negligence of the contracting party himself, which, of course, would cover the negligence of his servants. What he says is: " The words that have been held to give protection are, ' Under any circumstances whatsoever,' ' In any circumstances,' ' Under any circumstances,' or ' any injury, however caused.' " What we have here is " any damage, however caused." Then the conditions finish with the words " all cars being left in all respects entirely at their owners' risk." It is quite clear that in that last phrase it would not be possible to use an expression similar in type to the words " however caused," because the frame of the sentence and the thought expressed in it are not suited to those particular words. The words that have been used, corresponding, in my opinion, in content, are the words " in all respects " which appear to me to be the suitable words to show in a sentence, expressed as this one is, that whatever may happen, whatever may be done with regard to that car, the owner takes the risk of it happening or of it being done. It appears to me that the language is wide enough to produce that result and does on its true construction produce that result. The position, therefore, is that if the owners of the park put their servant there, even if they put him there with instructions to see that he does not hand over the car to anybody but the true owner, and if the servant in the performance of that duty performs it negligently, and, acting under a misapprehension which a little more care might have prevented, hands over the car to the wrong person, that, as it appears to me, is one of the risks which, on the true construction of this document, the car owner takes.

That, I think, covers the whole of this case, subject to two matters. First of all, the learned county court judge found that he could imply in this contract a term to the effect that the car should not be handed over without production of the ticket. I myself think that it was not legitimate to imply any such term. Not only is there no necessity to do so, but it seems to me that the implication of such a term would not be consistent with the express language of the conditions, because it would import into the contract an obligation with regard to safe custody which the language itself in terms negatives; and again I think it would not be consistent with the phrase "owners are requested to show ticket when required." In my opinion, therefore, it is not possible to imply such an obligation in this contract.

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(1) [1921] 2 K. B. 426, 437.

The last matter is this. It is said that this was a case where the bailees were guilty of conversion by delivering the article bailed to a person who was not its owner, and that having departed from the contract of bailment by so doing they are not protected by the particular conditions, which are intended to apply only during the contract of bailment. I am unable to accept that argument. The cases on which it was based—I need not go through them—appear to me to be cases dealing with quite a different class of subject-matter. In the present case if the construction which I have placed upon these conditions is the correct one (and assuming, contrary to my view, that there is a contract of bailment) the owners of the park are exempt from liability if, when the car is delivered out of their park (assuming always that it was delivered), it is negligently delivered to the wrong person. That is the way in which I think these conditions should be construed.

In the result the appeal must be allowed with costs here and below.

ROMER L.J. I agree. Mr. Cloutman has strenuously contended, and the contention found favour with the learned county court judge, that in this case the car was handed over under a contract of bailment. In Termes de la Ley, 1721 ed., p. 72, a book which was apparently described by Bailey J. as a book of great antiquity and accuracy, it is said: "Bailment is a delivery of things, whether writings, goods or stuff, to another, sometimes to be delivered back to the bailor, that is, to him that so delivered it, sometimes to the use of the bailee, that is, of him to whom it is delivered, and sometimes also it is

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delivered to a third person." Then in Stephen's Digest of the Criminal Law, 7th ed., p. 301, this is stated: "When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor, the person to whom it is made is called the bailee." This much, at any rate, emerges from those two passages quite clearly: in order that there shall be a bailment there must be a delivery by the bailor, that is to say, he must part with his possession of the chattel in question. In the present case there is no evidence whatever of any delivery in fact of the motor-car to the attendant on behalf of the defendants. All that the plaintiff did was to leave his car on the car park, paying the sum of 1*s*. for the privilege of doing so. It is true that, if the car had been left there for any particular purpose that required that the defendants should have possession of the car a delivery would rightly be inferred. If, for instance, the car had been left at the car park for the purpose of being sold or by way of pledge or for the purposes of being driven to some other place or indeed for the purposes of safe custody, delivery of the car, although not actually made, would readily be inferred. But it is perfectly plain in this case that the car was not delivered to the defendants for safe custody. You cannot infer a contract by A to perform a certain act out of circumstances in which A has made it perfectly plain that he declines to be under any contractual liability to perform that act. The defendants made it as clear as writing can make it in the ticket which was delivered to the plaintiff that they would not take any responsibility for the safe custody of any car. One cannot infer, therefore, in those circumstances that the car was left in the car park for the purpose of being in the custody of the defendants. It is also plain that the car was not left there for any other purpose. That being so it is impossible, as it seems to me, to find that the car was delivered to the defendants or that there was any contract of bailment. In these circumstances I need not deal further with the numerous authorities, not all of them very easily reconcilable, in which the Court has had to consider to what extent and in what circumstances a bailee is entitled to defend himself by a stipulation purporting to exonerate him from all damage or loss to the article which has been delivered to him as bailee. There being no contract of bailment here, because there was no delivery and no evidence of any undertaking on the part of the defendants to take the car into their custody, I do not have to consider the particular circumstances, as I say, in which a bailee is entitled to exonerate himself. But further than that, inasmuch as there was no delivery of the car to the defendants, one cannot infer a contract between the defendants and the plaintiff that the defendants would only redeliver the car on production of the ticket.

It only remains to deal with the suggestion that there was a conversion of the car by the servant of the defendants. Although the car was not delivered to the defendants, I apprehend that the servant acting within his authority might have bound the defendants by an act of conversion if he had purported to deal with the car as the owner. All that is said is that the attendant told the plaintiff, when he came back for his car and found it was not there, that he, the attendant, had given the car to somebody else. It is quite plain that the attendant did not use the word " given " in its ordinary sense, because the car was not his to give and he knew it. But it is said by Mr. Cloutman that what the word " given " shows is that the attendant purported to deal with the car in some way inconsistent with the rights of the plaintiff, who was the true owner. The circumstances in which such a dealing amounts to conversion have been stated by Atkin J., as he then was, in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (1): " It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion." Then he adds these words : " providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right." It is perfectly plain that this attendant did neither the one nor the other.

For these reasons, in addition to those which have been given by the Master of the Rolls, I think that this appeal must be allowed, with the consequences which the Master of the Rolls has indicated.

SCOTT L.J. I agree with the judgments which have been delivered, but out of respect for the careful judgment of the learned county court judge I desire to add a few reasons as to why I am differing from him. The essence of his judgment is that he assumed the de facto possession of the car passed from the owner to the defendants, and that the contract represented by the car park ticket was a contract of bailment appropriate to the passing of possession. In my view there was no contract between the parties except the mere permission to leave the car there on payment of 1*s.*, but I sympathize with the learned judge's view that the ticket imported a contract of bailment, because the language in which the defendants protected themselves from liability is language which in itself was much more appropriate to the assumption that the relationship of bailor and bailee existed than to the relationship of licensor and licensee. The natural and simple way of indicating on the ticket that there was no contract and that it was a mere licence would have been to say so. The moment you find detailed provisions for immunity such as those which are printed on this ticket you are tempted to infer that there is a contract imposing an obligation from which the party putting forward the conditions of immunity is seeking to protect himself. I sympathize, therefore, with the view of the learned

(1) 118 L. T. 596, 598.

county court judge that these clauses exonerating the proprietors of the car park from liability might reasonably be assumed to be inserted on the basis of a contract of bailment being the substance of the relationship. On analysis I agree with both my learned colleagues that that view is erroneous. I think if you look at the whole of the provisions on the ticket you realize in the result, after careful scrutiny, that they leave no obligation of a contractual kind at all upon the owners of the car park, and that the form of expression is merely due to a layman's choice of language and the absence of what you may call a natural lawyer's way of expressing that warning. In the result on the proper interpretation of these conditions I entirely agree that the dominating words are " All cars are left in all respects entirely at their owners' risk." Those words, I think, are unambiguous and in themselves exclude the idea of any contract of bailment. The words at the beginning of the sentence, namely, " The proprietors do not take any responsibility for the safe custody of any cars," read in the light of those concluding words, I think ought not to be read as importing any indication of a contract of bailment.

On those two short grounds, (1.) that the ticket when properly interpreted shows that there was nothing more than a licence, and (2.) that the moment you realize that there was no contract of bailment there ceases to be any ground at all for assuming as a fact that the possession of the car ever passed to the defendants, I think that the learned judge's judgment was wrong.

As regards the further point he makes that there ought to have been implied an additional term not to hand over the car to any one else, I think probably that he still had in mind the position of a bailee who may protect himself by clauses of exception from his ordinary obligation as a bailee in respect of care in safe custody, and yet still be liable if he misdelivers at the end of the contract of bailment, unless he has covered himself by very carefully chosen words. I cannot otherwise understand his view that that principle ought to be applied in the interpretation of this document. I think he was wrong there; there was no ground at all for implying any term in this particular document, both because it was not a necessary term and because the express terms are inconsistent with any such implication.

For these reasons I think that the learned judge's judgment must be reversed.

Appeal allowed.

Solicitors: *Cunliffe, Blake & Mossman, for Tolhursts & Cozens, Southend-on-Sea*; *Geoffrey B. Gush.*

H. C. G.

1937
April 13.

DAVIES *v.* MAY.

Coal mine—Offence—Non-provision of refuge holes—Offence by manager—Offence "committed personally"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 3, *sub-s.* 1; 44, 75, 102, *sub-s.* 5.

By s. 102, sub-s. 5, of the Coal Mines Act, 1911, no prosecution shall be instituted against the manager of a mine for an offence not committed personally by him except by an inspector or with the consent in writing of the Secretary of State. By s. 75 a manager may be guilty of an offence actually committed by another.

A manager was charged with omitting to provide refuge holes of the character required by s. 44. The actual duty of providing them fell on others; but under s. 75 the manager also was personally liable. By the same section he escaped responsibility if he proved that he had taken all reasonable means of enforcing (inter alia) the provisions of s. 44. This the appellant failed to prove:—

Held, that the omission to provide such holes was not an offence committed personally by the manager within the meaning of s. 102, sub-s. 5, of the Act, and that consequently the justices had no jurisdiction to entertain a prosecution by the respondent, who was not an inspector nor acting with the consent in writing of the Secretary of State.

CASE stated by Glamorgan justices.

At a court of summary jurisdiction sitting at Neath an information was preferred by the respondent, William Henry May, against the appellant, Rees L. Davies, for that he did not on March 26, 1936, provide refuge holes in the South Main Cross Measure and Johnsons Heading in the Cefn Coed Mine as specified in s. 44 of the Coal Mines Act, 1911. (1) As the case was not tried on its merits, but adjourned until after the decision of this appeal, the facts are only shortly reported.

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(1) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 3, sub-s. 1: "In every mine required to be under the control of a manager, daily personal supervision shall be exercised by the manager . . . ."

Sect. 44 enacted that refuge holes of specified measurements should be provided.

Sect. 75: "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the

The appellant was the manager of the said mine. The respondent, among others, had between May 2, 1935, and June 30, 1936, on behalf of the workmen made periodical inspections of the mine, making reports thereon to the inspector of mines for the district. On March 26, 1936, the respondent and another had inspected two haulage roads in the mine described as the South Main Cross Measure and Johnsons Heading. They measured some of the refuge holes in the said roads, nearly all of which the respondent alleged were of less dimensions than as prescribed by sec. 44, sub-s. 2. The person actually responsible for the making, maintenance, repair or reopening of refuge holes was the fireman, and the appellant would not in the course of his duties normally take part in the actual work of making, repairing or reopening refuge holes.

The appellant contended that failure to provide refuge holes under s. 44 was not an offence " committed personally " by him within the meaning of s. 102, sub-s. 5, of the Act (1), and that therefore the respondent could not lay the information.

It was contended for the respondent that inasmuch as a personal duty of supervision was imposed on the appellant by s. 3, sub-s. 1, of the Act, failure to provide proper refuge holes was an offence committed personally by him.

The justices held that the appellant had " committed personally " the offence, and that, therefore, it could be prosecuted by a person other than an inspector of mines or by one having

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mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance."

Sect. 102, sub-s. 5: " No prosecution shall be instituted against the . . . . manager . . . . for any offence under this Act, not committed personally by such . . . . manager . . . . which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State; and in the case of any offence of which the . . . . manager . . . . is not guilty if he proves that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against such . . . . manager . . . . if satisfied that he had taken such reasonable means as aforesaid."

(1) See note (1) ante, p. 260.

the consent in writing of the Secretary of State, and, consequently, could be prosecuted by the respondent. They then adjourned the further hearing.

Valentine Holmes for the appellant. There was no jurisdiction in the court below to hear the prosecution as instituted by the respondent, who was neither an inspector nor authorized by the Secretary of State, for this offence was not committed personally by the appellant. Sect. 44, sub-s. 1, of the Coal Mines Act, 1911 (1), which deals with the provision of these refuge holes, does not enact that the manager shall provide them, this duty being that of the firemen by the practice of the mine and under s. 14, sub-s. 1. Sect. 3, sub-s. 1 (1), imposes on the manager the obligation of daily personal supervision, but does not impose on him the obligation of personally putting right matters so supervised. If this is not true there would never be a case in which s. 102, sub-s. 5 (1), could operate. It is true that the whole scheme of the Act is to throw personal liability on (inter alia) the manager—see s. 75 (1)—but that is a different thing from making every offence one personally committed by him within the meaning of s. 102, sub-s. 5. (1) Offences of the latter character are created, e.g., by ss. 3, 4, 14, 16, sub-s. 2; 18, 19, 20, 24, 35, sub-s. 2; 80 and 94. In *Hannaford* v. *May* (2) Lord Hewart C.J. said: "The scheme of the Act of 1911 seems obviously to contemplate three different things. At one end of the scale there are offences committed by the manager personally; at the other end of the scale are offences committed by some person other than the manager. There is also an intermediate class of offences in which the offence is not personally committed by the manager but yet is of such a kind that by an inspector or with the consent of the Secretary of State the prosecution may be against the manager." The offence in the present case is in this third category, and s. 75 (1) clearly distinguishes it. In that category the manager is not liable for having done something, but is liable—doubtless in the interests of safety in the mine—

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(1) See note (1) ante, p. 260.

(2) [1935] 2 K. B. 385, 396.

because some one else has done something. The justices thought they were bound by the case of *Hannaford* v. *May* (1); but that case is clearly distinguishable, because the offence there charged, failure to keep a register in the form prescribed, was a breach of an obligation cast on the manager himself to cause the register to be kept in the form prescribed, and was, consequently, an offence "committed personally" by him.

Evershed K.C. and *Joshua Davies* for the respondent. Sect. 75 of the Act (2) is an answer to the appeal. It is quite clear that where there has been a breach of the safety provisions of the Act—which for the purposes of the argument must be assumed to have taken place in the present case—the manager has committed an offence unless he can show that he has taken all reasonable means, etc., within the meaning of s. 75. (2) This the appellant has failed to do, and therefore has committed personally an offence within the meaning of s. 102, sub-s. 5, of the Act. (2) The responsibility of (inter alia) the manager appears to be regarded by the Legislature as of supreme importance to the welfare of the miners: per Lord Hewart C.J. in *Hannaford* v. *May*. (3)

[*Lochgelly Iron and Coal Co.* v. *M'Mullan* (4), per Lord Atkin, was also referred to.]

The appellant also failed to fulfil his obligation under s. 3, sub-s. 1, of exercising daily personal supervision, and that omission was likely to endanger the safety of the miners, and was an offence committed by the personal default of the appellant within the meaning of s. 101, sub-s. 4. There cannot be an offence against the safety provisions of the Act (Part II.) for which the manager is not liable, and s. 75 distinguishes between offences committed by him vicariously and those committed personally, and in both cases he is guilty unless he can show that he has taken reasonable means, etc. Offences for which a manager may not be liable personally are, e.g., under ss. 14 and 17. This appeal is entirely without merits and merely raises the question of who is entitled to prosecute, and unless the Court finds itself obliged to do so it will not allow the appeal.

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(1) [1935] 2 K. B. 385.
(2) See note (1) ante, p. 260.
(3) [1935] 2 K. B. 395.
(4) [1934] A. C. 1, 9.

Valentine Holmes in reply. The distinction is between offences for which the manager is personally responsible and those personally committed by him, and it is in respect of the latter only that any member of the public may prosecute. The fact that a manager is liable personally for an offence does not establish that he has committed it personally.

[He was stopped.]

LORD HEWART C.J. This is a case stated by justices for the county of Glamorgan and it raises a neat point under the Coal Mines Act, 1911. The case arose in the following way. An information was preferred by the present respondent against the present appellant for that he did not on March 26, 1936, provide refuge holes on certain measures or headings in a mine which were as near as may be 3 feet in width and not less than 4 feet in depth, contrary to the Coal Mines Act, 1911. That information was heard in July and August of last year, and the justices then determined that the information had been properly laid by the respondent and that the appellant had a case to answer. The question, and the only question, raised by this case stated is whether it is correct to say in law that that information had been properly laid by the respondent.

The particular requirement of the Coal Mines Act, 1911, which was said to have been contravened was the requirement in s. 44, which is marginally described as referring to " Provision of refuge holes." Certain specific requirements are there set out, and it is to be observed, and it is essential to observe, that s. 44 is a part of the group of sections beginning at s. 29 of the Act which have to do with the topic of " Provisions as to safety " ; and there is a whole body of them. It is quite plain, as was said in this Court in the case of *Hannaford* v. *May* that this profoundly valuable legislation contemplates three quite different things. If I may be permitted to repeat the words I used, they were (1) : " At one end of the scale there are offences committed by the manager personally ; at the other end of the scale are offences committed by some person other than the manager. There is also an intermediate class of offences in which the offence is not personally committed by the manager but yet is of such a kind that by an inspector or with the consent of the Secretary of State the prosecution may be against the manager." What was urged here on the part of this appellant was that the offence alleged under s. 44 of the Act was not an offence committed personally by him, if it was indeed committed at all, and that under the provisions of s. 102, sub-s. 5, of the Act no prosecution could be instituted against the manager for an offence of this kind except by an inspector or with the consent in writing of the Secretary of State.

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(1) [1935] 2 K. B. 385, 396.

The justices in the court below seem to have been invited to hold, and they have in fact held, that the case is governed by the decision of this Court already mentioned in *Hannaford* v. *May* (1); but there is a manifest and conspicuous contrast between that case and the present case, because that case depended upon a section which specifically named the manager of the mine as being required to cause certain things to be done. There is no such express mention of the manager in s. 44; but it is argued and argued very attractively, if I may say so, by Mr. Evershed that this question is concluded by the provisions of s. 75 of the Coal Mines Act, 1911 (2), and there was a moment when I was inclined to think that that argument was, as he said it was, conclusive. That section provides as follows: "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance." Mr. Evershed argues that in view of the provisions of that section no offence can

(1) [1935] 2 K. B. 385.

(2) See note (1) ante, p. 260.

be committed in contravention of any of the provisions relating to safety (that is to say, referred to in the sections from s. 29 to the end of Part II.) without personal liability and commission of the offence on the part of the manager. Once, he says, it is established that the offence referred to is an offence against some provision of this Part of this Act, that is to say, Part II. relating to safety, it follows as of course that the offence is personally committed by the manager (and by the owner and agent) unless and until he proves that he had taken all reasonable means, etc. That is an attractive argument, and when one reflects that the particular topic in these provisions is safety, and safety in a coal mine, it is easy enough to suppose that Parliament might have intended that in such cases there should be not merely personal liability on the part of the manager, for example, but that the offence should be deemed to be committed by the manager personally. But on looking further into the matter, I cannot take that view. Indeed, it seems to me to be contradicted almost in terms by the very section which provides how prosecutions may be launched. Sect. 102, sub-s. 5, begins by providing that : " No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State " ; and then comes this significant addition : " and in the case of any offence of which the owner, agent, manager, or under-manager of a mine is not guilty if he proves that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against such owner, agent, manager, or under-manager, if satisfied that he had taken such reasonable means as aforesaid." Now those are the very words which are taken from s. 75 of the Act (1), and when one looks at s. 75 it seems to me to contain within itself a clear distinction. It is divided into two parts. The first part provides that " Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act " ; that is the first set of cases. There follows a second set of cases that seem to me to be based upon circumstances in which, although the contravention or non-compliance is that of one person, another person may be held responsible. In other words, a distinction is drawn between the person committing the offence and the person who may be responsible. How do the words go on?—" and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever "—that person is the person who commits—" the owner, agent, and manager of the mine shall each be guilty of an offence against this Act " ; scilicet, although he does not commit it. The person who commits it is liable ; the owner, agent and manager is to be liable although he does not personally commit it, unless he proves that he has taken all reasonable means by publishing and to the best of his power enforcing the relevant provisions.

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(1) See note (1) ante, p. 260.

Reading that section with s. 102, sub-s. 5, I think it is clearly contemplated that offences of that nature, although they may be offences for which the manager may properly be prosecuted, if the prescribed conditions are fulfilled, are nevertheless offences not committed personally by the manager. I think the words are as clear as one could reasonably expect in a complicated statute, and that in s. 75 the antithesis is pointed with sufficient clearness between " any person whomsoever," who is apparently the person committing the contravention or failing to comply, on the one hand, and the owner, agent and manager, who are constructively deemed to be guilty of another person's offence unless and until they prove suitable diligence on their own part, and I think that that scheme falls naturally and easily within the general scheme of this Act. As Mr. Valentine Holmes has pointed out, there are various sections in this Act which manifestly in terms impose a personal liability upon the manager. In such cases contravention or non-compliance on the part of the manager amounts to an offence personally committed by him ; but there is a different class of case, where, although the offence is not personally committed by the manager he is nevertheless held liable and may be found guilty of an offence unless he discharges the burden of proving that he did all he was required to do—namely, to publish and to the best of his power to enforce the provisions of the Act.

Here the Act does not impose by s. 44 an express duty upon the manager to do the act referred to, the act being to provide refuge holes in certain places. Undoubtedly there was an overriding responsibility on his part to see that the provisions of the statute were fulfilled and undoubtedly, therefore, if the requirements of s. 102, sub-s. 5, had been complied with—if, that is to say, an inspector or one who had the written consent of the Secretary of State had launched the proceedings—he might have been found guilty of the offence. But he is not to be prosecuted at the instance of somebody who is neither an inspector nor a person having the written consent of the Secretary of State.

I think, therefore, that there is a clear ground of distinction between this case and the case of *Hannaford* v. *May* (1) and that the justices came to a wrong conclusion in holding that the information in this case had been properly laid by the respondent, who was not an inspector and who had not the written consent of the Secretary of State. For these reasons, it appears to me that this appeal by way of case stated ought to succeed, and that we ought to remit the case to the justices.

HUMPHREYS J. I have arrived at the same conclusion, after entertaining, in the course of the argument, some considerable doubts. I desire, in the first instance, to make an observation about a matter which has not been the subject of argument at the Bar at all. It occurred to me in reading this case that it is an inconvenient form of procedure which has been adopted here. The justices purport to ask the opinion of this Court upon a preliminary matter which arose. No doubt they did so because in their view what was challenged was their jurisdiction to hear the case at all. What they have found is that the information was properly laid by

(1) [1935] 2 K. B. 385.

the respondent and that there was a case for the appellant to answer. Speaking entirely for myself, I should have thought that the more convenient—and, I am disposed to think, the right—course for them to have adopted would have been for them to hear the case for the appellant, to hear his evidence, and, if they had then come to the conclusion that the appellant had made out that which, according to the statute, would afford a defence to him, no further question would have arisen, and no need would have arisen to state a case for this Court at all; and the view which I have just expressed is fortified by this consideration: the real question, it seems to me, which we have to decide is whether the offence in this case, which was, we must assume, committed by somebody, was committed personally by the manager of the mine. Now that appears to me to be to a very large extent a question of fact, and I think it would have been very useful to this Court to have had the finding of the justices upon the whole of the facts of the case when they were asking this Court to say, as they would then have asked this Court to say, whether they were right or wrong in coming to that conclusion. They have found nothing in regard to the matter, and the view which I have formed about this question is this. I think there may well be cases under s. 44 of this Act in which there may be a personal offence, or rather an offence committed personally by a manager. I think, on the other hand, there may be offences committed by a manager against that section which are not properly described as offences committed personally by him. I ask myself, upon the very meagre facts of this case, Is this a case in which the evidence seems to show that the offence was committed personally by the manager, in which case anybody might properly prosecute him, or is it a case in which the facts seem to show that if he was guilty at all he was guilty vicariously, because he was the manager of a mine and some person for whom in law he was responsible had personally committed the offence in question?

Now turning to the case, it seems to me that there is sufficient to show that this is a case in which there was no personal commission by the manager of any wrongful act or omission: the person who was primarily responsible for that failure to comply with the provisions of the Act and for contravening the provisions of the Act was quite a different person, called a fireman—some person other than the manager. I then turn to s. 75 in order to see how such matters are dealt with. Sect. 75 appears to me to deal with two quite different matters, each of which involves responsibility upon some person. It provides, first of all, that a person who himself contravenes or does not comply with the provisions of the Act shall be guilty of an offence against the Act, and then it provides that in the event of any contravention of or non-compliance with the provisions of this Part of the Act by any person whomsoever, the owner, agent and manager of the mine shall be guilty of an offence against the Act. I can only read that as meaning that while any person, whether he is the owner, agent, manager or anybody else, who has committed the offence of contravening or failing to comply with the provisions of the Act, may be prosecuted, and where the owner, agent or manager has not personally contravened the provisions of the Act or failed to comply with the provisions of the Act, nevertheless the latter may be prosecuted if some other person has committed that offence, and may be convicted unless they prove certain matters, such as that they had taken reasonable steps to the best of their power to enforce the provisions of the Act.

Now that section does seem to me to create two quite different classes of offence—the offence which is committed by a person who personally does the things which are prohibited, and the offence which is created by the statute on the part of the person who is responsible for the acts of others. There is nothing unusual in our law in finding that persons who are morally guiltless are caused to be punished for the acts of others. Indeed, in modern statutes it has become quite common and quite usual to make persons who are the owners, whether of vehicles or public-houses, responsible for the acts of other people; and so it is here. Then I ask myself the question: Looking at the terms of s. 102, sub-s. 5, can this manager (who, on the facts as I understand them, had nothing to do with a breach of the Act of Parliament except that as the manager liability is put upon him) be said to be a person who has committed personally the offence which is charged? In my view he cannot be said to have committed it personally at all.

For those reasons, and for the reasons stated by my Lord, I agree with the result which he has proposed.

SINGLETON J. I agree, and for this reason. It seems to me that on a true reading of s. 102, sub-s. 5, of the Coal Mines Act, 1911, there is no offence committed personally by the manager; consequently, the proceedings cannot be laid except by an inspector of mines or with the consent in writing of the Secretary of State. The respondent is not an inspector of mines, nor was the prosecution instituted with the consent in writing of the Secretary of State. It is to be remembered that the charge in the information, that the appellant, Mr. Rees Davies, did not, on March 26, 1936, provide refuge holes on the South Main Cross Measure and Johnsons Heading in the mine of the required dimensions, is a charge made under s. 44 of the Act. It is not a charge based on s. 3, alleging lack of supervision.

Mr. Evershed relied upon s. 75 of the Act. I agree with what has already been said, to the effect that that deals with two different things: (1.) offences committed personally by certain people, and (2.) offences created for which an owner, agent and manager may in certain events become responsible. I do not think, on the facts as stated in this case, that there is any offence committed personally by the manager; consequently, this appeal must be allowed.

Solicitors for appellant: *Furniss, Stephen & Co., for Arthur J. Prosser, Cardiff.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

W. L. L. B.

1937
May 5.

MIDDLESEX COUNTY COUNCIL *v.* NATHAN.

Local Government—Public health—Poor law—Poor person—Hospital treatment—Assistance other than poor relief—Liability of relative to maintain—Recovery of expenses—" If possessed of sufficient means "—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 6*—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 131*—Poor Law Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 14), *ss.* 41, 43*—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *ss.* 5, 14, 16*—Poor Law Act,* 1930 (20 *Geo.* 5, *c.* 17), *ss.* 14, 163.

By the Poor Law Act, 1930, s. 14, sub-s. 1, and s. 19, sub-s. 2, a county council may obtain a maintenance order upon relations liable under the Act to maintain any person whose relief would be chargeable " if possessed of sufficient means."

By the Local Government Act, 1929, s. 5, the county council have powers to provide assistance otherwise than by poor relief, including (s. 14) the power to provide hospitals conferred on local authorities by the Public Health Act, 1875, s. 131; and (s. 16) it is the duty of the council to recover from any person maintained in any institution or " from any person legally liable " to maintain that person such part, if any, of the expenses " having regard to their financial circumstances " as they are in the opinion of the council able to pay:—

Held, that the words " legally liable " in the Local Government Act, 1929, s. 16, include persons rendered liable for the cost of maintenance by statute, and not only those liable at common law; but that, before an order for payment can be made upon any person under that section, it is incumbent upon the council to show that the defendant is possessed of sufficient means to pay the amount claimed.

Motion before du Parcq J. for judgment in default of defence.

This motion originally came before Porter J., who adjourned the case for argument, having regard to the legal questions involved.

The statement of claim was as follows:—

1. The plaintiffs are the county council of the administrative county of Middlesex, and under the powers conferred on them by the Public Health Acts, 1875 to 1926, and the Local Government Acts, 1888 and 1929, provide accommodation in a hospital known as the North Middlesex County Hospital.

2. Solomon Nathan, an old and poor person unable to

work is the lawful father of the defendant. Solomon Nathan was admitted to the hospital for treatment for a condition which is not an infectious disease on June 6, 1936, and was maintained by the plaintiffs therein until August 13, 1936.

3. The said hospital is an institution within the meaning of the Local Government Act, 1929, s. 16.

4. The average daily cost per patient of the maintenance of the hospital ascertained in accordance with the provisions of the Local Government Act, 1929, s. 16, sub-s. 3, and the Middlesex County Council Act, 1934, s. 144, was for the material period 10*s.* 7.9*d.*, and a weekly rate of 3*l.* 14*s.* 7.4*d.* is charged by the plaintiffs.

5. [This paragraph recited the Local Government Act, 1929, s. 16.]

6. The plaintiffs have recovered from the said Solomon Nathan and one Alfred Nathan, a person legally liable to maintain the said Solomon Nathan [1*l.* 9*s.* 8*d.* and 2*l.* 18*s.* 4*d.* respectively, out of total expenses amounting to 36*l.* 4*s.* 11*d.*] and are satisfied that the said Solomon Nathan and Alfred Nathan cannot reasonably, having regard to their financial circumstances, be required to pay the whole or any greater part of the expenses of maintaining the said Solomon Nathan in the hospital.

7. The defendant is and at the material time was a person legally liable to maintain the said Solomon Nathan. The plaintiffs' claim is for 31*l.* 16*s.* 11*d.*

The defendant did not appear.

F. J. Wrottesley K.C. and *Harold B. Williams* for the plaintiffs. The defendant is legally liable under the Local Government Act, 1929, s. 16, to pay for hospital treatment given to this sick person, who is his father. By the Poor Law Act, 1927, s. 41, sub-s. 1, and s. 43, sub-s. 2, which reappear in the Poor Law Act, 1930, s. 14, sub-s. 1, and s. 19, sub-s. 2, the council may obtain orders against relations liable under the Act to maintain poor persons if they are possessed of sufficient means. The Local Government Act, 1929, took the " assistance " of the sick poor out of the realm of the Poor Law Acts. By s. 5 it enabled the councils to make such provision otherwise than by way of poor relief, and to declare in the administrative scheme that it should be provided either by way of poor relief or by virtue of the appropriate statute. The statutes named in that section included the Public Health Act, 1875, which enacts in s. 131 that any local authority may provide for the inhabitants of their district hospitals or temporary places for the assistance of the sick. The Local Government Act, 1929, s. 14, sub-s. 1, confers similar powers on the county councils. By s. 16 the council are required to take steps to recover these expenses, if possible, from persons of the class " legally liable." Otherwise they will be liable to have their accounts surcharged for neglect of duty, or an order of mandamus could be obtained against them. The words " legally liable " include those liable by the force of statute and not only those liable at common law. Having ascertained that the defendant is a member of this class the council are to satisfy themselves that he is able to pay as required by s. 16, and his liability is limited in accordance with his means. This is a substitute for the poor law procedure in claims for the recovery of these expenses. The onus is not upon the council to prove the defendant's ability to pay. The council make their own investigations as to the defendant's means and act thereon.

R. M. Montgomery K.C. (*G. D. Squibb* with him) as amicus curiae for the defendant. Since the time of Queen Elizabeth (Poor Relief Act, 1601, s. 6) the near relatives of poor persons have been liable for their relief and maintenance, the relations " being of sufficient ability," but the manner and amount are at the discretion of the justices. That provision was re-enacted in the Poor Law Act, 1927, and it now appears in the Poor Law Act, 1930, s. 14, sub-s. 1, and s. 19, sub-s. 2. Those sections provide that the council must first apply to the justices for an order upon the person liable, directing payment of the cost of maintenance of the assisted person. The Local Government Act, 1929, s. 5, enabled the councils to provide assistance " otherwise than by way of poor relief." They might declare the assistance to be either by way of poor relief or under the particular statute applicable—here the Public Health Act, 1875, s. 131. Sect. 16 of that Act enables the council to recover such expenses as the poor person or the relative legally liable can afford to pay. That Act takes the assistance out of the realm of Poor Law and puts it on a different plane. The councils have not, however, secured the power given to local authorities by the Public Health Act, 1875, s. 132: *Allen* v. *Waters & Co.* (1) If the plaintiffs' contention is right it is at the option of the council to treat relief to a poor old and sick person as being given under the Poor Law Acts or not and by not treating him as a pauper, but regarding the relief as assistance given under the Public Health Act, 1875, they may obtain a larger part of the cost of maintenance than they would otherwise recover. This cannot have been the intention of the Legislature. It was the duty of the council, as formerly of the guardians, to go to the justices for an order for maintenance upon the person liable. The words "legally liable to maintain" in s. 16 of the Act of 1929 either refer to persons liable at common law, or to those liable by statute fully to maintain, or to persons liable under the Poor Law Acts, subject to statutory conditions which must be fulfilled. The defendant here does not come under the first of these heads and, so far as the second is concerned, the conditions have not been complied with. For the plaintiffs have not pleaded that the defendant had sufficient means to pay.

Further, the poor person here is not within the Poor Law Act, 1930, which in s. 163 provides that "poor person includes any poor or indigent person applying for or receiving relief." The word "includes" should be read as "means and includes": *Dilworth* v. *Commissioner of Stamps.* (2) The words of the definition do not extend the meaning of "poor person" and it is exhaustive for the purposes of the Act, that is to say, the term means "a poor or indigent person who has applied for or received relief," and the defendant's father is not within that definition.

Wrottesley K.C. in reply. The word "includes" in the

(1) [1935] 1 K. B. 200.

(2) [1899] A. C. 99, 105, 106.

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definition clause of the Poor Law Act, 1930, should not be narrowed down to "means." It has an extending meaning and does not exclude other significations of the term "poor person": *Reg.* v. *Kershaw.* (1) The fact that the defendant has sufficient means wherewith to pay is sufficiently pleaded in para. 7 of the statement of claim.

DU PARCQ J. In this case, a question of importance comes before me upon a motion for judgment. The plaintiffs are the county council of the administrative county of Middlesex; the defendant is Mr. Harry Nathan. The material facts are contained in paras. 1 to 6 of the statement of claim, and in dealing with a motion for judgment I must assume that those facts are accurately stated and give judgment as if they had all been proved to my satisfaction by evidence.

It is unnecessary to recapitulate those facts, but para. 7, as I read it, contains no allegation of fact. It is well known, though sometimes forgotten, that r. 4 of Order XIX. of the Rules of the Supreme Court enacts that "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies." I do not say that it is wrong to state inferences of law sometimes in the pleadings, and the statement of claim raises the point which it was desired to raise, clearly and neatly, but there is no allegation of fact in para. 7. The words are: "The defendant is and at the material time was a person legally liable to maintain the said Solomon Nathan." A great difference of opinion, and a legitimate one, is revealed by the arguments I have heard as to what persons are legally liable to maintain Solomon Nathan. An allegation in that form is a submission of law rather than a statement of fact, so that I ignore it, and I must decide this case upon facts which are stated in the first six paragraphs of the statement of claim.

I must deal briefly with the statutes which have been referred to by the learned counsel in this case. I have had the great advantage not only of hearing Mr. Wrottesley for the plaintiffs, but also of hearing an argument from Mr. Montgomery. The case came on originally before Porter J., who saw the importance of the question that was raised, and with the concurrence of the plaintiffs expressed a desire that the Court should be assisted by having the points argued. In the result it has been found possible to secure the assistance of Mr. Montgomery, whom I have heard as amicus curiae. That being so, I am in a better position to decide the case than I should have been if I had heard only one side. But although I have had the assistance of the arguments on both sides, I do not think it desirable that I should decide more than is necessary for the purpose of this case. Taking the statutes in chronological order, I have been referred to the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6, which appears as s. 7 in Pickering's Edition of the Statutes at large. The section provided: "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or every poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in the manner, and according to that rate, as by the Justices of Peace of that County where such sufficient persons dwell, or the greater number of them, at their general Quarter Sessions, shall be assessed." That has remained in substance the law as far as poor relief is concerned up to the present time; but there have been developments as to the persons charged with the relief of the poor and the justices before whom the question should be brought, and in 1927 the Poor Law Act of that year was passed, which was undoubtedly a consolidating Act. That contained much the same provision as was contained in 43 Eliz. c. 2, s. 6; but instead of being in one section, it is to be found in two sections. Sect. 41, sub-s. 1, enacts the duty, which is imposed on the specified relations "if possessed of sufficient means," while s. 43, sub-s. 2, enacts that a board of guardians (guardians now having replaced the overseers) may "obtain orders of maintenance upon the relatives liable under this Act

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(1) (1856) 6 E. & B. 999.

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to maintain any person whose relief would be chargeable to them in such manner and according to such rate as the Court may order." It is of importance to see upon whom the duty to relieve and maintain poor persons falls. Looking at this Act, as at the Act of Elizabeth, it would be wrong to say that every child of a poor, old, blind, lame and impotent person, or other poor person not able to work, was under a duty to relieve and maintain such person. A necessary part of the description of the persons who come under this Act is to be found in the words "if possessed of sufficient means," and there is no duty at all unless that provision is fulfilled.

Historically, the next statute that comes into question here is the Local Government Act, 1929; but before I deal with that it is convenient to say that the Poor Law Act, 1927, is in substance re-enacted, so far at any rate as concerns me to-day, in the Poor Law Act, 1930. The relevant provisions are to be found in the Poor Law Act, 1930, s. 14, sub-s. 1, and s. 19, sub-s. 2. The latter section provides that orders are to be obtained upon the relations liable under the Act, so that it is necessary to show the petty sessional court that the person against whom an order is sought is "possessed of sufficient means," not necessarily sufficient means to pay everything that is due, but sufficient means to pay at any rate something of what is due. So far we have been in the region of poor law relief only. Before I come to the Local Government Act, 1929, it is desirable to look at the Public Health Act, 1875, s. 131. That enacted that "Any local authority may provide for the use of the inhabitants of their district, hospitals or temporary places for the reception of the sick." It is unnecessary for me to say anything about s. 132. As will presently appear, county councils have now secured powers similar to those of local authorities; but they have not, by the Act of 1929, obtained the power given to local authorities by s. 132 of the Public Health Act, 1875. That has been determined by the decision of the Court of Appeal in *Allen* v. *Waters & Co.* (1) The Local Government Act, 1929, sought, to

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a great extent at any rate, to take out of the realm of Poor Law a large number of people who obtained what may be called assistance. Sect. 14 gave the county council the same powers with regard to the provision of places for reception of the sick as were conferred on local authorities by the Public Health Act, 1875, s. 131. County councils therefore found themselves in a position to provide assistance for the sick, not as poor persons or paupers at all and not under the Poor Law Acts.

Parliament thought it proper in those circumstances that there should be some provision under which the county council should, in certain cases, be able to recover from certain persons who had the means to pay and were under liability to relieve and maintain the person assisted, some part or the whole of the expense of such assistance. That brings me to the crucial section—namely, the Local Government Act, 1929, s. 16, which provides: " As from the appointed day, it shall be the duty of the council of every county and county borough and of every other local authority to recover from any person who has been maintained by them in any institution "—with exceptions which I need not enumerate—" or from any person legally liable to maintain that person, the whole of the expenses incurred by the council or authority in the maintenance of that person, or, if the council or authority are satisfied that the persons from whom the expenses are recoverable cannot reasonably, having regard to their financial circumstances, be required to pay the whole of those expenses, such part, if any, of the expenses as they are in the opinion of the council or authority able to pay."

It is a matter of great importance to county councils, because the terms of that section are mandatory; if they failed to fulfil their duty, the High Court would compel them by mandamus to perform it, and it may be that Mr. Wrottesley is right in saying that the council might be surcharged by the auditor. There is therefore an imperative duty laid upon the councils that they shall recover the expenses from any person legally liable to maintain the person assisted. Mr. Montgomery suggests that that may mean legally liable at common law. I must say that I see no reason to accept that contention. I think those words must include persons legally liable by the force of some statute.

The question is whether the allegations of fact in this statement of claim show the defendant to be a person legally liable to maintain Solomon Nathan.

A point was taken as to the effect of the definition clause in s. 163 of the Poor Law Act, 1930, which says that : " A poor person " includes " any poor or indigent person applying for or receiving relief " ; and Mr. Montgomery says that I ought to read the word " includes " there, as if the word were not " includes," but " means." Mr. Montgomery referred me to a judgment of the Privy Council in *Dilworth* v. *Commissioner of Stamps* (1), and there is ample authority that a Court sometimes is bound to read " includes " as if it were " means." I do not desire in this case to express a final opinion of that argument of Mr. Montgomery, because it is unnecessary to do so. I will assume that, although there is no allegation that Solomon Nathan ever applied for or received relief, he still comes within the class of persons mentioned in s. 14 on the ground that he was, as the statement of claim alleges, poor and old and unable to work. So that I have the fact that the defendant is the child of one of those persons, and then the question remains, is he possessed of sufficient means ? Those words, as I have said, are vital to the definition or description set out in s. 14. If the county council are in a position to satisfy the Court that a person who is a child of one of the assisted persons unable to work is possessed of sufficient means, then they can recover either in the county court or in the High Court—the county court in the ordinary way would probably be the appropriate tribunal—expenses which he has sufficient means to pay. But I am satisfied that unless the council prove that the defendant has sufficient means, they do not bring him within the ambit of the Local Government Act, 1929, s. 16, because they do not show him to be a person " legally liable " to maintain the assisted person.

(1) [1899] A. C. 99, 105, 106.

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When I look at this statement of claim, excluding, as I have said I must exclude altogether para. 7, I find no allegation that the defendant is possessed of sufficient means to pay anything. It is said that the difficulty of the construction which I am putting upon s. 16 is that that section contemplates some sort of inquiry by the council and leaves it to the council to decide whether the person who is within the class mentioned in the Poor Law Act, 1930, s. 14, has sufficient means to pay some or all of the expenses. I see no difficulty about it, but even if there were any difficulty about it, I could not be induced for that reason to give a different meaning to the words " any person legally liable to maintain " from that which I have given to them, and to leave out of the definition those vital words " if possessed of sufficient means." But indeed, what s. 16 is saying, in my view, is this. There is this imperative duty upon the council; but the council are not obliged to waste money by taking proceedings against people who have not any means, and the council are not obliged to do what most people would think harsh and unnecessary—namely, to take proceedings for the whole of the expenses against somebody who, they think, though he may have enough money in the Savings Bank to pay the whole of the expenses, could not reasonably, having regard to his financial circumstances, be required to pay the whole of the expenses. The Legislature, remembering that Corporations as public bodies are sometimes said to be lacking in charity and the virtues which we like to associate with private persons, have made it possible for a public body to exercise those virtues. Public bodies are often supposed to be harsh, not because they want to be, but because they cannot be generous at the expense of the ratepayers. If there had been an obligation without an exception, the council might have found themselves compelled to take proceedings which they would have regretted. As it is, they are entitled to consider a man's financial position; they have a certain discretion, and they may say: " We do not think in these circumstances that we can suggest that this man can reasonably be required to pay the whole of the expenses."

The result is that this motion for judgment fails on the ground that there is no allegation that the defendant was possessed of sufficient means.

Motion dismissed.

Solicitor: *C. W. Radcliffe, solicitor to the Council.*

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[1936. T. No. 1634.]

Landlord and tenant—Lease of dwelling-house—Covenant to repair—Landlord's covenant to keep outside walls and roofs in good and tenantable repair, fair wear and tear excepted—Disrepair due to natural causes, including wind, rain and decay—Liability of landlord under covenant.

The under-lease of a house contained a covenant by the under-lessors to "keep the outside walls and roofs in good and tenantable repair as and so far only as is required to be done by them under the head-lease." By the head-lease the lessees (predecessors in title to the sub-lessors) covenanted to keep the premises "in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted)":—

Held, that the exception from the covenant of fair wear and tear included damage to the outside walls and roofs of the house caused by natural agencies such as rain, wind and decay, and also consequential damage to the interior of the house caused by the same agencies.

Haskell v. *Marlow* [1928] 2 K. B. 45 overruled.

Decision of du Parcq J. reversed on this point.

Held, by du Parcq J., that the express covenant by the lessee to pay the rent and the covenant by the lessor to keep the outside walls and roofs in repair were independent covenants.

Appeal from the judgment of du Parcq J. in an action tried by him without a jury.

By a lease dated June 5, 1925, Harold Phillips demised to Charles Holly and Ruby S. Francis the messuage shop and premises Nos. 7 and 7A Pavilion Road in the parish of St. Luke, Chelsea, in the county of London, to hold unto the lessees as tenants in common to June 24, 1925, and thenceforth for the term of eleven and a half years at the rent therein specified, and the lessees thereby for themselves and their assigns covenanted (inter alia) that they would during the term "keep the premises hereby demised and the fixtures, painting, papering and decorations thereof in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted)"; and the said premises and fixtures in such good order and condition, except as aforesaid, at the determination of the term would peaceably and quietly yield up to the landlord.

By an indenture of assignment dated November 7, 1927, the said C. Holly and R. Francis assigned to Basil Garages, Ld., all the premises comprised in the above-mentioned lease to hold for the residue of the term granted thereby and at the rent and subject to the covenants and conditions therein contained; and the covenants implied under the Law of Property Act, 1925, s. 77, para. D, were incorporated therein.

By an under-lease dated February 21, 1929, Basil Garages, Ld., demised to William Nelson Webb, boot and shoe repairer, the shop No. 7A Pavilion Road aforesaid with the first floor rooms over the same and over the ground floor garage No. 7 Pavilion Road aforesaid, but not including that garage, to hold for the term from February 8, 1929, to December 19, 1936, at the yearly rent of 300*l.* to be paid in advance by twelve equal calendar monthly payments on the 8th day of each calendar month: And the under-lessee thereby covenanted that he would pay the rent reserved on the days and in the manner appointed; and would during the term keep the interior of the premises and the fixtures papering and decorations thereof in good and tenantable repair, damage by fire excepted, and would as occasion required thoroughly clean (inter alia) all waterpipes, and keep all ballcocks and pipes in good order: And Basil Garages, Ld., the under-lessors, thereby covenanted with the under-lessee to "keep the outside walls and roofs properly repaired and cleansed as and so far only as is required to be done by them under the said lease under which they hold the demised premises," and that the under-lessee paying the rent and performing the covenants on his part to be performed should peaceably and quietly hold the demised premises without any disturbance by the under-lessors or any person lawfully claiming under them.

By an indenture of assignment dated March 27, 1929, Basil Garages, Ld., for the consideration therein mentioned, assigned to Charles Taylor, hotel proprietor, the premises Nos. 7 and 7A Pavilion Road, comprised in the lease of June 5, 1925, to hold for the residue unexpired of the said term of eleven and a half years subject to the rent thereby reserved and the covenants on the part of the lessee therein contained to be paid observed and performed, and subject as to a part of the premises (namely, No. 7A) to, and with the benefit of, the under-lease dated February 21, 1929; and the covenants implied under the Law of Property Act, 1925, s. 77, sub-s. 1 (*c*), were incorporated therein.

The premises No. 7A Pavilion Road consisted of a shop on the ground floor and living rooms on the first floor. In the front part of the first floor facing the street there were three rooms. Originally that was the full extent of the house, but at some time before 1925 those rooms were connected with other rooms at the back by means of a passage having as its floor what had been the roof of the lower structure. That passage had a glass covering and was divided into two, the inner half having been converted into a bathroom. The other half formed a passage to the living rooms behind. These rooms were lighted only by skylights and had no fireplaces.

On November 6, 1935, C. Taylor, the plaintiff, brought the present action against W. N. Webb, the defendant, for 150*l*. in respect of rent due under the under-lease dated February 21, 1929.

On November 28, 1935, it was ordered that the plaintiff be at liberty to sign judgment on the claim, but that there should be a stay of execution pending the trial of a counterclaim to be delivered by the defendant.

On December 7, 1935, the defendant delivered his defence and counterclaim in which he stated by way of defence that subject to the counterclaim he admitted the plaintiff's claim; and by way of counterclaim he stated (inter alia) (para. 6) that the plaintiff was bound by covenants (being those abovementioned) in the under-lease of February 21, 1929, and the lease of June 5, 1925, to keep the outside walls and roofs of the premises demised to the defendant as aforesaid properly repaired and cleansed and the fixtures, painting and papering and decorations in good and tenantable repair (destruction by fire and fair wear and tear excepted) during the term of the under-lease held by the defendants; (para. 7) that in breach of

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these covenants the plaintiff had neglected to do any proper or any sufficient repairs; (para. 8) that by reason of the breach of the covenants and nuisance created by the plaintiff as alleged the defendant had suffered damage; and that the defendant claimed damages and an injunction to prevent the plaintiff continuing the said nuisance.

The plaintiff in his reply and defence to the counterclaim stated that he denied that he had committed the breaches of covenant alleged or any of them, and that the defendant had suffered the damage alleged by reason of such alleged breaches.

On March 5 and 6, 1936, the counterclaim was tried by du Parcq J. without a jury.

At the trial evidence was given by the defendant, by a Mr. Page, an architect and surveyor, and by Mr. King, a builder, as to the state of the premises at various times during the defendant's occupation. When the defendant went into possession in 1929 he found the premises in a satisfactory condition. When he had been in possession for about three years trouble arose because of the disrepair of the roofs and skylights. Complaints were made to the sanitary inspector and to the plaintiff. Some repairs were done in 1933, but they were of little effect. In 1934, the trouble was so serious that the back rooms became uninhabitable. The defendant had to ask his lodgers to leave the front rooms so that he and his family could live in them. The back rooms had since become derelict. More repairs were done in January, 1935, which again were not effective, and subsequently more were done. At the date of the action the back rooms, passage and bathroom were in a dilapidated and unsanitary state, these rooms being uninhabitable. The evidence also showed that the defective condition of the roofs, skylights, and glass covering over the passage-way, and the resulting state of the interior, was due solely to the operation of natural causes—namely, wind, rain and decay. It further appeared that a notice dated November 23, 1935, was served by the sanitary inspector of the borough of Chelsea upon the plaintiff stating that the premises 7A Pavilion Road were in such a state as to be a nuisance or dangerous to health by reason of the roof being defective, and requiring him to abate the nuisance and make the roof watertight; and that on February 25, 1936, the sanitary inspector spoke of taking proceedings.

1936. March 6. DU PARCQ J. In this action the plaintiff, Mr. Taylor, claims 150*l.* for rent due and in arrear from the defendant, Mr. Webb. The defendant had no defence to the claim for rent, but he counterclaimed for damages for breach of covenant to repair by the plaintiff. [His Lordship stated the facts and the substance and effect of the evidence as above set out and continued as follows:] Counsel for the plaintiff has argued a number of different points. His final contention was that the result of the exception of fair wear and tear was that the plaintiff's liability was strictly limited. He referred to *Terrell* v. *Murray* (1) as deciding that the plaintiff was not liable under that clause where the lack of repair was due to lapse of time and to the elements. I asked him in what possible circumstances the landlord would be liable, and he gave as an instance the case of the roofs being demolished by an earthquake.

I am fortunately saved from the task of considering many old cases because a recent case which is in point is binding on me. I refer to *Haskell* v. *Marlow* (2), where the Court had to consider the meaning of the words "Reasonable wear and tear excepted" in a will under which the testator devised a lease of premises to his widow. She lived there for forty-two years, during which time she did no active harm, but did nothing substantial to counteract the natural process of decay. It was held by the Divisional Court that it was impossible to say that the exception of reasonable wear and tear entirely protected her executors from liability under the repairing covenant.

I think it is plain that the judges in that case drew no distinction between "reasonable wear and tear" and "fair wear and tear," and I also am unable to do so in this case. Salter J. said: "In my opinion, such words as 'fair' and 'reasonable' in an exception of this kind qualify both the destructive agencies and also the dilapidation which they

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(1) (1901) 17 Times L. R. 570.

(2) [1928] 2 K. B. 45.

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bring about. Such words can be used no doubt to qualify human user, but they could not be used to qualify forces of nature. It would be impossible to speak of an 'unfair rain' or an 'unreasonable frost.' To bring dilapidations within the protection of such an exception as that in this case, I think that two things must be shown: First, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair the premises and the other circumstances of the case." (1) The same reasoning applies to the words "fair wear and tear." Talbot J. agreed and expressed his view in a manner which is perhaps more closely applicable to this case. He said (2): "The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and as to condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce."

I apply that language to this case in this way. The landlord's obligation to keep the outside walls and roofs properly repaired is subject to the exception that he is not liable for defects produced by fair wear and tear. It has been proved that the walls and roofs were not properly repaired, and it lies on the landlord to show that the lack of repair comes within the exception. In considering whether that has been proved one has to remember that it is his duty to prevent consequences flowing from wear and tear which would not have occurred if the original defects had been attended to. If he fails to attend to them it cannot be said that the consequences which ensue because the defects grow and spread and others come into existence are due to fair wear and tear.

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(1) [1928] 2 K. B. 56.

(2) Ibid. 58.

In this case the plaintiff fails to show that he is protected by the exception, because, whether he misunderstood his liability under the covenant or whether he did not choose to spend the money, he has done no more than tinker with the defects. They have been allowed to go from bad to worse. I think, therefore, that the exception only protects him to the very limited extent which I have mentioned.

I have now to consider whether the skylights in the back rooms are part of the roofs, and therefore repairable by the landlord. Counsel for the plaintiff says that they are not and that they are fixtures which the tenant is bound to keep in repair. I get some assistance on that point from *Boswell* v. *Crucible Steel Co.* (1) There a tenant had covenanted to repair landlord's fixtures. The outside of the premises mainly consisted of plate-glass windows, and it was held that they were part of the structure of the building and were not included in the term "fixtures." I have no doubt that the skylights are part of the building, and I also think that they are part of the roofs, and that that was the intention of the parties. If they were not, it would mean that over part of the building there would be no roofs. The next point taken by Mr. Ricardo was that the defendant ought not to be allowed to claim damages for lack of repair because he had not fulfilled his part of the contract with regard to the payment of rent. Mr. Ricardo says that that breach goes to the root of the contract and cannot be compensated by damages, and, therefore, that the covenant to repair cannot be treated as an independent covenant. The tenant, it is said, must be in a position to prove that he has fulfilled his part of the contract before he can recover damages for breach of the repairing covenant. The only authorities to which I propose to refer are *Dawson* v. *Dyer* (1) and *Edge* v. *Boileau.* (2) Each of these cases concerned a covenant for quiet enjoyment, which, as one knows, is almost always in the form in which it appears in those two cases—namely: "The landlord covenants that the tenant paying his rent and performing his covenants shall quietly enjoy the premises without interruption from the landlord." At first sight one would think that the landlord might say that, until the tenant had performed his duty to pay the rent, he could not sue on that covenant. That was the contention in *Dawson* v. *Dyer* (1), but it failed. It was pointed out that the landlord had a right of re-entry, but that if he could not re-enter without breach of the covenant for quiet enjoyment, he might not do so even if the tenant had not paid the rent. That was followed more recently in *Edge* v. *Boileau.* (2) There the Court held that the covenant for quiet enjoyment and the covenants by the lessee to pay the rent and do repairs were independent covenants. I think that the present case is a stronger one than those, because none of the formal words of the covenant for quiet enjoyment are here to embarrass me. I hold that these are independent covenants and that the tenant who has not paid the whole of the rent is yet entitled to claim damages, and that the non-payment of rent does not absolve the landlord from his duty to do the repairs. It is difficult to assess with precision the damages to which the defendant is entitled for that breach; but, having regard to all the circumstances, I assess them at 130*l.*, and there must be judgment for the defendant on the counterclaim for that amount.

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(1) [1925] 1 K. B. 119.

The plaintiff appealed. The appeal was heard on January 27 and 28, 1937.

C. A. *Pritt K.C.* and *J. Ricardo* for the plaintiff, appellant. It is submitted that the decision of du Parcq J. that the appellant

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(1) (1833) 5 B. & Ad. 584.

(2) (1885) 16 Q. B. D. 117.

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as lessor is liable to the respondent as tenant for the damage to the house was wrong. The first question is whether the appellant is bound by the terms of his repairing covenant to repair damage to the house caused as this damage was caused. The appellant's covenant obliges him as landlord to keep the outside walls and roofs of the demised premises in good repair, fair wear and tear excepted. That covenant only obliges the appellant to repair the outside walls and roofs in so far as they have been damaged by causes other than fair wear and tear, and it exempts them entirely from liability for damage caused by wear and tear. The exception of fair wear and tear includes damage caused by the forces and processes of nature, such as rain, wind and decay whether of long or short continuance, and whether great or small in amount: *Terrell* v. *Murray* (1); *Davies* v. *Davies* (2); and see *Manchester Bonded Warehouse Co.* v. *Carr.* (3)

[SLESSER L.J. referred to *Winn* v. *White.* (4)]

As to the disrepair here in question, the damage to the outside walls and roofs of the premises was certainly caused solely by the elements and is therefore damage caused by fair wear and tear within the meaning of the exception from the appellant's covenant for which he is not responsible. As to the damage to the interior of the premises, if that was consequential damage caused by the elements through the disrepair of the roofs, that also was caused by fair wear and tear within the exception and the appellant is not liable for it. If, on the other hand, the damage to the interior of the premises was not consequential damage caused by the elements through the disrepair of the roofs, then, in the absence of any default on his part of which there is no evidence, the appellant is clearly not liable for that damage, because he is under no covenant to do internal repairs. The learned judge in the Court below would seem to have misconstrued this covenant by treating it as obliging the appellant to do two different sets of repairs—namely, to the outside walls and roofs, and also to the interior of the premises, which he never

(1) (1901) 17 Times L. R. 570.
(2) (1888) 38 Ch. D. 499.
(3) (1880) 5 C. P. D. 507, 513.
(4) (1773) 2 W. Bl. 840.

covenanted to repair. In the case of *Haskell* v. *Marlow* (1) the tenant for life of a dwelling-house, who held it under a condition similar in terms to the landlord's covenant in the present case, was held to be responsible for disrepair caused by the action of the elements and for consequential damage resulting therefrom, notwithstanding the exception of fair wear and tear. du Parcq J. no doubt rightly regarded himself as bound by that case and followed it; but it is submitted that that case was wrongly decided, and that this Court should overrule it and reverse the decision of the learned judge.

Secondly, the covenant of the appellant, as lessor, to do repairs, and the covenant of the respondent, as lessee, to pay the rent are mutually dependent covenants, and as the respondent is admittedly in default under his covenant to pay rent, he is not entitled to maintain a counterclaim against the appellant for alleged breaches of the latter's covenant to repair. It would obviously be unfair that the respondent, while causing the appellant to suffer loss by failing to pay his rent, should be allowed to subject him to further loss by making him pay for repairs. The principle that reciprocal obligations are mutually dependent has been recognized in this and other departments of the law: *Graves* v. *Legg* (2); *Bettini* v. *Gye* (3); *Bastin* v. *Bidwell* (4); and *Fingland & Mitchell* v. *Howie* (5), and that principle should be applied here. The cases of *Dawson* v. *Dyer* (6) and *Edge* v. *Boileau* (7), in which it was held that a lessee's covenant to pay rent and a lessor's covenant for quiet enjoyment were independent covenants, are distinguishable from the present case, because the performance by the lessor of a covenant for quiet enjoyment does not necessarily involve him in any expense.

L. M. Minty for the defendant, respondent. The decision of du Parcq J. was right and should be affirmed. The appellant, as landlord, is liable under his repairing covenant to make good all the disrepair affecting the demised house. If the covenant did not contain the exception of fair wear and tear there can be no question that the appellant would be liable under it for the disrepair of the roofs, and also, it is submitted, for the consequential damage to the interior of the house. The exception from the covenant of fair wear and tear does not prevent the appellant from being liable. The appellant, as lessor, not being in occupation of the house or capable of making use of it, the exception of fair wear and tear in his repairing covenant is meaningless and should be treated as mere surplusage. In *Haskell* v. *Marlow* (1) and, indeed, in all the other cases in which that exception has been considered, it occurred in a lessee's covenant where it had a reasonable meaning. If a tenant allows permissive waste he becomes liable at common law to forfeiture of his lease: see Shepherd's Touchstone, p. 145; so that there is good reason for introducing into a tenant's repairing covenant an exception of fair wear and tear. The terms of the exception of fair wear and tear in the common case in which that exception occurs in a lessee's repairing covenant have been held to be inappropriate to disrepair caused by the agencies and processes of nature, such as rain, wind and decay: *Haskell* v. *Marlow* (1); and see *Manchester Bonded Warehouse Co.* v. *Carr.* (2) The same rules of construction must be applied to that exception where, as here, it occurs in a lessor's covenant. Rightly construed, therefore, the exception in this covenant does not relieve the lessor from liability for the disrepair here complained of. Assuming that the exception of fair wear and tear may include damage done by the agencies of nature, the burden is upon the appellant of showing that the dilapidations in question were due to that cause. Fair wear and tear means normal wear during the lessee's occupation. It is a question of fact and degree in all the circumstances whether a given amount of disrepair is within the exception: *Scales* v. *Lawrence* (3), and where the disrepair goes beyond that point it ceases to be fair wear and tear. It is submitted that in the present case the disrepair went far beyond that point

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(1) [1928] 2 K. B. 45.
(2) (1854) 9 Ex. 709.
(3) (1876) 1 Q. B. D. 183.
(4) (1881) 18 Ch. D. 238.
(5) 1926 S. C. 319.
(6) 5 B. & Ad. 584.
(7) (1885) 16 Q. B. D. 117.

(1) [1928] 2 K. B. 45.
(2) 5 C. P. D. 507.
(3) (1860) 2 F. & F. 289.

and should be attributed in great part not to the action of the elements, but to the negligence of the appellant in failing to do reasonable repairs. When the roof was found to be defective the appellant became bound under his covenant to repair it, and when he failed to do so the damage ceased to be fair wear and tear due to the elements and became attributable to the default of the appellant, who is accordingly liable for the further damage to the roof and for the consequential damage to the interior of the house. As the appellant did no substantial repairs for a long time he ceased to be protected by the exception of fair wear and tear: *Haskell* v. *Marlow*. (1) If the exception of fair wear and tear be construed as including all damage done by the elements, however long continued, the lessor's repairing covenant will become a nullity.

Secondly, even if the respondent's covenant to pay the rent and the appellant's covenant to repair are dependent covenants, the disrepair occurred before the rent fell in arrear, and the performance by the appellant of his obligation to repair was a condition precedent to his right to recover the rent. These covenants, however, are not dependent.

[SLESSER L.J. The Court does not require to hear argument on behalf of the respondent in support of the proposition that these covenants are not dependent.]

1937. Feb. 5. The following written judgments were delivered:—

SLESSER L.J. This appeal arises on a counterclaim by the defendant, who was the tenant of the plaintiff at all material times, for damages for breach of covenant to repair certain premises known as 7A Pavilion Road, Chelsea.

The obligation relied upon is contained in a lease dated February 21, 1929, between the landlords, the Basil Garages, Ld., who have assigned their interest to the plaintiff, and the defendant, and the obligation of the landlord contained in clause 6 (*c*) is to " keep the outside walls and roofs properly repaired and cleansed as and so far only as is required to be done by them under the head-lease." By that head-lease of June 5, 1925, between the landlord and two tenants, from whom the present plaintiff derives title, the obligation of the tenants was, by clause 3, during the term to keep the premises demised and the fixtures, painting, papering and decorations thereof " in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted) "—so that, limiting the obligation to keep in good and tenantable repair to the outside walls and roofs, the definition of " properly repaired and cleansed " in the head-lease is applied to the lease of February 21, 1929, subject to the exception " destruction or damage by fire and fair wear and tear excepted." It is to be noted that under this inartistic method of reference the liability and exception are applied to the landlord to the extent to which he, as tenant, would have been liable under the head-lease.

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The defendant, Mr. Webb, when he went into possession in 1929, found the premises in satisfactory condition; but three years later trouble arose, as is found by the learned judge, because of the landlord's failure to do repairs to the roofs and walls, including the skylight. According to the evidence of Mr. Page, an architect and surveyor, the effect of wind and rain was the cause of the condition of the skylight and roof. Mr. King, a builder, adds that the slates had cracked by age, wear and tear; the time and weather conditions caused the soakers to get out of repair and decay of nailing due to atmospheric action caused the slates to slip. As a result, in 1934 the back rooms became uninhabitable and are now derelict, and the passage, bathroom and back living rooms are, admittedly, in a most serious state of disrepair. It is said that insects are infesting the premises as the result of damp, and that water fused the electric light, the ceiling of the loft had fallen down through damp and that the inhabitants contracted chills. Finally, the sanitary inspector, Mr. Crandell, on February 25, 1936, said that he would have to take proceedings.

In these circumstances, it is said in the counterclaim, for

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the plaintiffs' claim for rent due is not before this Court, that the plaintiffs, the landlords, are liable for damages for breach of covenant to repair, and the question of law arises, what, under their covenant to keep the outside walls and roofs properly repaired, fair wear and tear excepted, is the landlord's obligation ? In the first place I would observe that on the evidence it is clear that the whole of the resulting damage has followed from the defective condition of the roofs, walls and skylight, as to which, according to Mr. Page, there has been neglect of pointing, bridging and flashing, and that such defective condition is solely due to the operation of natural causes of wind and weather and natural decay. In my opinion, on the uncontradicted evidence, it is impossible to say that the condition of the walls and roofs are the result of anything other than fair wear and tear. Wear and tear may, of course, arise from the operation of natural process or through the result, direct or indirect, of human agency, and the meaning to be attached to the adjective " fair " may vary accordingly.

In this case, no question of propriety of user by the landlord arises, and we have not here to consider the difficult problem at what point interference by him with the walls and roofs covenanted to be repaired might amount to a user which would negative the exception of fair wear and tear, as might conceivably arise, if the landlord had, by weakening the power of the structure to resist the effect of the elements or otherwise in one way or another, caused the resultant damage. So dealing only with the effect of the passing of time and the weather, I agree with Salter J. in *Haskell* v. *Marlow* (1) that the words " fair " or " reasonable " cannot appropriately be used to qualify the forces of nature and that in such a context they can only mean the normal action of the elements. (2) Treating the word " fair," therefore, in the absence of any question of human user of roofs and walls as applied to the problem of physical exposure, as synonymous with " normal," that is what the parties would reasonably anticipate. The facts of this case seem to me to bring the absence of repair,

(1) [1928] 2 K. B. 45. (2) Ibid. 57.

resulting in the deterioration of walls and roofs, directly within the exception which excludes the landlord from the obligation of reparation. Reliance has been placed by du Parcq J. on the decision of the Divisional Court on appeal from an Official Referee in *Haskell* v. *Marlow* (1), which, on its facts, seems indistinguishable from the present case and he has purported to follow it ; if it is correct, this appeal should fail.

In that case a testator had devised a dwelling-house to his wife for her life, she keeping the same in good repair and condition (reasonable wear and tear excepted). After his death the widow remained in the house for forty-two years, when it was found to be in a " very shocking state of disrepair." As in this case, nothing had been actually done to injure the house, but the widow had omitted almost entirely to repair it and had done little to counteract the decay. The action was brought by the trustees of the will against the executors of the widow for compensation. In the words of Salter J., " On those facts," he would have had " some difficulty in holding that the dilapidations were not caused by reasonable wear and tear," but he came to the conclusion that they were altogether unreasonable in amount and inconsistent with the plain intention of the testator (1), though earlier he seems to treat the case of a will as raising similar problems to the case of a lease. (2) For the purpose of the present case, the problem of the intention of the testator may be disregarded, but in so far as it is suggested that the amount of dilapidation may be said to make wear and tear, which would otherwise be reasonable or fair, unreasonable and unfair, I am unable, with respect, to agree. The learned judge says that in his opinion " the word ' fair ' or ' reasonable ' qualify both the destructive agency and the dilapidations." He cites the case of *Terrell* v. *Murray* (3) and *Manchester Bonded Warehouse Co.* v. *Carr* (4) as authorities for employing these double criteria. In the *Manchester* case (4) Lord Coleridge C.J., delivering the judgment of the Court, points

(1) [1928] 2 K. B. 57.
(2) Ibid. 50.
(3) 17 Times L. R. 570.
(4) 5 C. P. D. 507.

out that "reasonable wear and tear includes destruction to some extent, namely, destruction by ordinary friction" (1), and I am unable to see that the case is any authority when considering the meaning of "fair wear and tear," for looking to the degree of destruction produced. In *Terrell's* case (2) Bruce J. includes in the exception "reasonable wear and tear," friction of the air, and dilapidation caused by exposure, and there is no suggestion in his judgment that the amount of such dilapidation may become unfair or unreasonable on account of its amount. I can find no authority for the view expressed by Salter J. in *Haskell's* case (3) that the amount of the dilapidation can in itself make it unreasonable, when it is occasioned by normal wear and tear of the elements, and in so far as he appears to base his judgment on that consideration, I disagree.

Talbot J., as I read his judgment, proceeds upon a different principle. He agrees that reasonable wear and tear means "the ordinary operation of natural forces" (4), but goes on to say that "the exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear . . . . It does not mean that if there is a defect originally proceeding from wear and tear" the (covenantor) is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce. Again, with regret, I am constrained to differ. If, in fact, the landlord, as here, can be heard to say that he is only required to keep the outside walls and roofs properly repaired in cases where fair wear and tear are excepted, and if there be no case against him other than for dilapidation to walls and roofs through fair wear and tear, he has committed no breach of his covenant and is under no obligation. In these circumstances, I am unable to see how, if he was under no

(1) 5 C. P. D. 513.
(2) 17 Times L. R. 570.
(3) [1928] 2 K. B. 45.
(4) Ibid. 59.

obligation to repair, he can be held responsible for the consequential damage which flowed from an obligation to repair walls and roofs which was not his.

It will be observed that in this case, unlike the case of *Haskell* (1), there was no general obligation to keep the dwelling-house in good repair and condition but only the walls and roofs, and for the reasons which I have stated I have come to the conclusion in this case, on the facts, that the landlord had no obligations whatever with regard to reparation, and I think that *Haskell's* case (1) was wrongly decided.

This appeal, therefore, should succeed and the judgment of du Parcq J., giving damages on the counterclaim, should be reversed.

SCOTT L.J. In the King's Bench Division the plaintiff obtained judgment under Order XIV. for arrears of rent, execution being stayed pending the trial of the counterclaim in which the defendant claimed damages against him for breach of his covenant as under-lessor to repair. That issue was tried before du Parcq J., and the learned judge gave judgment on the counterclaim for the defendant, as under-lessee, for 130*l.* damages. The plaintiff appealed, the stay on execution of his judgment for rent being continued pending the appeal.

Two points were taken on behalf of the appellant both below and before us: firstly, that on the facts in evidence or admitted there was no breach, and, secondly, that the landlord's covenant to repair was conditional upon performance of the tenant's covenant to pay the rent. As this Court is in favour of the appellant on the first point and is allowing the appeal on that ground, it is unnecessary to express any opinion on the second.

The issue on the first point turns upon the correct interpretation of the landlord's repairing covenant in the under-lease of the premises in question, which, as agreed between counsel before us, by assignment became binding on

(1) [1928] 2 K. B. 45.

the plaintiff and the defendant respectively. It is in these words: "The landlords will at all times during the said term keep the outside walls and roofs properly repaired and cleansed as and so far only as is required to be done by them under the lease under which they hold the demised premises." The lessee's covenant in the head-lease thus referred to is in these terms: "The tenants will during the said term keep the premises hereby demised . . . . in good and tenantable repair, destruction or damage by fire and fair wear and tear excepted." It is these two combined sentences which we have to construe; but it will be convenient before discussing their meaning to summarize the facts to which the covenant has to be applied. So far as material they are stated expressly or by implication in du Parcq J.'s judgment. The premises consisted of a ground floor shop, a staircase and a first floor over the shop and extending also over a garage next to and behind the shop. The front portion of the first floor had an ordinary roof over it, the passage and bathroom behind had a glass covering, and the back rooms were attics lit by sky-lights. The learned judge held, and I think rightly, that the glass covering and the sky-lights were part of the roofs mentioned in the covenant, and therefore within the landlord's obligation. When the respondent went into possession in 1929 he found the premises in a satisfactory condition of repair. During the subsequent years of his tenancy the roofs, sky-lights and glass-covering over the passage-way got into a seriously defective condition and this led to consequential damage by wet and damp inside the premises, amounting to "a serious state of disrepair" in important parts of the interior. The learned judge does not expressly find that this defective condition was caused solely by the ordinary wear and tear of the elements, namely, by wind and weather, nor that it was in no way attributable to any "unfair" use of the premises by anybody; but I think that findings of fact to that effect are implicit in the express statement in the judgment that "the evidence of the defendant's architect was not exaggerated," for the learned judge's note of the evidence of the architect makes it quite clear that in the architect's opinion the whole of the damage in question was directly caused by rain-water getting through the roof, sky-lights and glass-covering, the wind and weather having produced the leakages; and according to the architect's evidence none of the disrepair had been caused by any positive action on the part of the respondent and there was no suggestion either that any of it had been caused by any positive acts of the appellant. The existing condition was due solely to the elements and to the fact that nothing had been done to arrest existing, or prevent further, decay.

Strange as it may seem this common exception in repairing covenants in leases, "fair (or reasonable) wear and tear excepted" has never come up for judicial consideration in either the House of Lords or the Court of Appeal, although it has, of course, often been considered and applied in Courts of first instance; the only detailed analysis of it is in the Divisional Court decision of *Haskell* v. *Marlow* (1), to which my Lord has referred. In the present appeal we are called upon to consider it; but even so our task is not quite the ordinary one, as we have to construe the words removed from their normal context of a tenant's covenant and transported into the text of a landlord's covenant. The result of this incorporation is to produce a strange hybrid—semi-virumque bovem, semi-bovemque virum—a topsy-turvy covenant by a landlord seeking to measure his obligation as landlord in an under-lease by the scope of his commitment as tenant in the over-lease. In order to construe it the first step must be to ascertain the meaning of the incorporated tenant's covenant as it stood by itself in the over-lease. The phraseology of that covenant is in absolutely common form, "that the tenant will keep the premises in repair" (describing the degree required) "destruction or damage by fire and fair wear and tear excepted." One's first impression is that the meaning is quite plain, but second thoughts call for careful analysis. The covenant must, of course, be read as a whole, and one must not make the mistake of assuming that because one can divide it into different parts any one part can be read as if it stood alone—as, for instance, that the undertaking to repair

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covers the whole ground and that the exception is a mere qualification of a pre-existing obligation. But subject to that caution, the covenant does divide into three parts: (I.) the earlier words, which, taken by themselves, impose on the tenant a general obligation to repair, an obligation which, if it stood alone and unqualified, would apply to all defects, whatever their cause; (2.) the words of exception which prevent the earlier words from operating as a general obligation, for they wholly cut out certain causes of defect—namely, accidental fire and wear and tear (with the meaning of these last words I will deal in a moment); (3.) the proviso attached to the exception of wear and tear—namely, that the tenant is not to enjoy the benefit of it, if the wear and tear has been brought about through an unfair (or unreasonable) user of the premises by himself or by any person for whom he is responsible, that is to say, his licensees.

The phrase "wear and tear" is a very old English idiom and the clause "fair" (or "reasonable") "wear and tear excepted," has been common in leases and tenancy agreements for two or three centuries. It is, like many idiomatic expressions, complex in meaning; it implicitly refers to both cause and effect, and in each aspect it covers two classes of disrepair, (*a*) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, in contradistinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake; and (*b*) that brought about by the tenant, and other persons present in or on the premises with the consent of the tenant, either unintentionally or as a normal incident of a tenant's occupation, in the course of the "fair" (or "reasonable") use of the premises for any of the purposes for which they were let. Sense (*a*), the first of the two senses covered by the phrase "wear and tear" when used in repairing covenants, is somewhat analogous to the sense of the words when used in marine insurance. There the perils of the sea against which the policy protects are exceptional or abnormal marine events, at least in point of degree, and sufficiently so to constitute them "accidents": and a line was drawn in old sailing-ship days between the normal damage and cutting away of sails, spars and ropes incidental to ordinary heavy weather on the one hand, which does not constitute a peril insured against, and an abnormal casualty which does; and the old law and even the old idiomatic phrase reappear in statutory guise in s. 55, sub-s. 2 (*c*), of the Marine Insurance Act, 1906. So in the law of landlord and tenant legal interpretation of the phrase as applied to the elements has produced a similar demarcation of degree between the normal and the abnormal, the ordinary and the extraordinary; leaving a penumbral zone where a jury may wander and lawfully come to its own conclusion, a zone of "give and take" decisions, as Willes J. said in *Scales* v. *Lawrence.* (1) That the phrase "wear and tear" includes in its scope my sense (*b*), namely, the tenant's user and its effect, is too plain to need argument, and is well recognized in the decided cases.

Having thus seen what is covered by "wear and tear" the next step is to construe the word "fair." As an aid to interpretation it is important to remember that the word "reasonable" is just as common in the clause as the word "fair," the one being used for practical purposes as synonymous with the other. Therefore, presumably, the word "fair" is not intended to be read as having a wholly different attribution from the word "reasonable." The latter word is incapable of being attributed to the elements, the wind and weather. It can sensibly and properly be attributed to the way in which the tenant uses the premises. In my view "fair" has a similar attribution; it is applicable, whether as an adjective or as an adverb, to the conduct of the tenants in "using" the premises. Neither "reasonable" nor "fair" can apply to the elements as a cause of wear and tear; the elements cannot be either fair (except in the meteorological sense) or reasonable. Nor can either word be used as applying to the *effects* of the elements; the phrase cannot mean a fair *amount* of resultant wear and tear, as a countryman may speak of a "fair"-sized turnip. In my view the word "reasonable" or "fair" applies only to the

(1) 2 F. & F. 289, 291.

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treatment of the premises by the tenant. This reasoning leads me to the conclusion that the phrase "fair (or 'reasonable') wear and tear" is an elliptical idiom in which only a part of the well understood meaning is expressed. The effect of either epithet is to prevent the tenant having carte blanche as to his user of the premises ; the word is a stipulation simply and solely about his conduct, limiting his right to rely on the exception, where the state of disrepair has been caused by him or his invitees, by a proviso that such tenant's user must have been "fair" (or "reasonable"). If he uses the premises "unfairly" (or "unreasonably") he loses pro tanto the benefit of his exception.

The next step in construction is to consider what meaning, if any, the words "fair wear and tear excepted" would have, if expressly inserted in a landlord's covenant to repair. "Wear and tear" would plainly still include the effects of normal and ordinary natural causes, like wind and weather. But what about the "fair user" of the premises, implied by the words in the tenant's covenant ? The position of the landlord in relation to the demised premises during the term presents little analogy to the position of the tenant. He is not going to occupy the premises. On the other hand, in exercise of his right of entry, or of using a party-wall, or other land adjacent or subjacent, he might cause damage to the demised premises, and I see no reason why in regard to such acts the limiting provision of behaving fairly or reasonably should not apply.

But in the present case the words were not written in extenso in the landlord's covenant ; they were only brought in by reference and for a limited purpose—namely, to restrict the scope of the landlord's covenant to the high-water mark of the liabilities in fact incurred by him as lessee under the head-lease. It is further to be observed that in the present case the question whether in respect of main walls and roofs the appellant was immune as regards all wear and tear or only on condition of his using them "fairly" is immaterial. The learned judge in effect found, and in my view rightly found, that the whole of the disrepair was due to the elements,

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coupled with the absence of any steps by anybody to prevent further progress of the decay: there was no suggestion of any "unfair" user by anybody, either tenant or landlord.

Out of deference to du Parcq J., and also to the late Salter J. and the present Talbot J., who decided the case of *Haskell* v. *Marlow* (1), which the learned judge followed, I desire to explain exactly why I disagree with the reasoning upon which that case was decided. A testator had devised a dwelling-house to his wife for her life, she insuring the same against loss by fire "and also keeping the same in good repair and condition (reasonable wear and tear excepted)." The widow occupied the house for forty-two years, doing no repairs, and as a result of the wear and tear of the elements the premises fell into a bad state of decay. She then died, and the trustees of the will on behalf of the remaindermen sued her executors. The Official Referee gave the plaintiffs 550*l.* for dilapidations. It was contended on appeal by Mr. Rayner Goddard, as he then was, for the defendants that the words in question merely expressed the position at law of a tenant for life—namely, freedom from liability for permissive waste; but the Court dismissed the appeal, both judges concurring in the conclusion but reaching it by quite different paths. Salter J. in effect held that the obligation to repair was "the dominant intention" and that the exception was merely a minor modification of it. (2) He then quoted certain cases in which judges had "laid very little stress on the exception" and inferred an opinion on their part that the exception did not "make any great or grave inroad on the general liability to repair." Finally he decided that the word "reasonable" or "fair" qualified both the destructive agency, and also the amount of dilapidations, that is to say, the quantum of effect produced by wear and tear, and that in its application both to cause and effect it meant the same as the word "normal." For the reasons already given I disagree with these views. Talbot J., without expressing either dissent from or assent to Salter J.'s views, put his judgment on quite different grounds. He discerned a new condition, not expressed but implied in

(1) [1928] 2 K. B. 45.
(2) [1928] 2 K. B. 45, 50, 51.

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the exception—namely, that the disrepair should have been *directly* caused by the wear and tear, and then said (1): "It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition as to everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce." (1) I disagree with both his views. I see no justification for implying the word "directly" when it is not there, except in so far as the causa proxima is prima facie always to be sought. But this is not his meaning of the word "directly," for it would not lead to the vital conclusion on which his judgment rested—namely, that given natural causes in operation and producing wear and tear the covenant throws upon the covenantor a positive duty of stepping in and spending money in order to arrest the wear and tear due to those causes. This, in my opinion, is to remould the clause which the parties agreed to put in, and is not interpretation; it is therefore wrong. His view as to the duty of preventing damage by wind and weather may be tested by a question. At what stage in the process of natural decay does the duty arise to effect repairs and prevent the further ingress of the elements?—on the first leak? If so the exception is made meaningless. Upon Nature's enlargement of the leak? Where is the line to be drawn? There is no such limitation of degree in the exception. In my view the mere operation of normal wind and weather does not at any stage confer on the covenantee the right to call on the convenantor to come in and effect repairs in order to prevent further effects of wind and weather.

I do not propose to discuss any of the cases which were considered either in *Haskell* v. *Marlow* (2) or by du Parcq J. in the present action, because that learned judge based his legal conclusion expressly on the passage of Talbot J.'s judgment which I have quoted. (1) The foundation of fact

(1) [1928] 2 K. B. 59.

(2) Ibid. 45.

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to which he applied it was that the whole of the disrepair had been caused by natural wear and tear; and there was neither allegation nor evidence before him of any "unfair" behaviour of either party against the other in relation to the premises, so that no question of onus of proof ever arose. Omission to prevent cannot give rise to a cause of action where there is no duty to prevent. *Haskell* v. *Marlow* (1) was a case of a tenant for life and a remainderman; but the words there were the same as the usual exception in a lease, and I see no ground for construing them differently. I think the clause was wrongly interpreted in that case, and that the appeal before us must be allowed and judgment entered for the appellant on the counterclaim.

FARWELL J. The facts in this case have already been stated and it is unnecessary for me to repeat them. It is sufficient to say that by the under-lease of February 21, 1929, the under-lessor, who is the appellant, covenanted, in effect, to keep the outside walls and roof in good and tenantable repair, fair wear and tear excepted. Under that covenant the lessor is prima facie liable for the serious state of disrepair into which admittedly the walls and roof have fallen, unless he can show (and the onus is on him) that that condition is due wholly to fair wear and tear. The meaning of the exception in such a case as this is, in my judgment, that the lessor is under no liability for disrepair due solely to such ordinary natural causes as may fairly be said to have been in the contemplation of the parties, for example, wind and weather, assuming no abnormal use of the property by him. The evidence in this case as proved at the trial, and as found by the learned judge, either expressly or inferentially was such as to bring the cause of the disrepair within the exception and therefore it would seem that the lessor must escape liability. The learned judge in the Court below, however, has held him liable to the extent of 130*l.*

On behalf of the respondent it was argued that that decision was right on two grounds. It was said that to import such

(1) [1928] 2 K. B. 45.

an exception into the covenant by the lessor with regard to outside walls and roof, was in effect to render the covenant nugatory and that therefore the words should be treated as mere surplusage. It is no doubt the fact that the inclusion of the exception in this covenant reduces very materially the liability of the lessor and may enable him in many cases to escape liability altogether; but the exception has been inserted in the covenant, and I can see no justification for disregarding it. In construing the covenant the Court is bound to read it as a whole and, accordingly, this argument, in my judgment, cannot avail the respondent. The other argument, as I understand it, was that although the lessor may have been originally under no liability, yet by standing by and doing nothing with the result that the state of disrepair grew steadily worse he must now be held liable. This contention I fail wholly to understand. The non-performance even for a long period of acts for which the covenantor was under no initial liability cannot create a liability.

The learned judge in coming to the conclusion to which he did, followed a decision of the Divisional Court in *Haskell* v. *Marlow.* (1) That decision was binding on him and he no doubt was right to follow it; but, in my judgment, that case was wrongly decided for the reasons which have already been given by the other members of the Court.

In the result I think that the decision in the Court below was wrong and this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff, appellant: *Martyns & Gane.*
Solicitor for defendant, respondent: *J. Prag.*

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(1) [1928] 2 K. B. 45.

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Police—Power of dismissal of constable by Chief Constable or Watch Committee—Resignation of constable—Right to return of rateable deductions—Towns Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 10—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 191—*Police Pensions Act,* 1921 (11 & 12 *Geo.* 5, *c.* 31), *s.* 20—*Police Appeals Act,* 1927 (17 & 18 *Geo.* 5, *c.* 19), *s.* 1.

The appellant, a sergeant in the Liverpool police force, on July 27, 1933, handed in the statutory month's notice of resignation. On August 8 charges were preferred against him of offences against discipline. On August 14 the Chief Constable, after an inquiry, purported to dismiss him; and on August 29 the Watch Committee at a meeting, at which the Chief Constable was present during the deliberations, purported to dismiss the appellant's appeal from the Chief Constable's sentence of dismissal. The Watch Committee thereupon refused to repay to the appellant the accumulated rateable deductions from his pay to which he claimed to be entitled under s. 20, sub-s. 1, of the Police Pensions Act, 1921. The appellant then sued the Chief Constable and the Watch Committee claiming declarations that he had duly resigned, and was therefore entitled to be repaid the rateable deductions that had been made from his pay:—

Held (Macnaghten J. dissenting), (1.) that in a borough the right to dismiss a police constable is vested solely in the Watch Committee, but that in this case that Committee had no power to dismiss the appellant, who had already terminated his service by due notice of resignation, and it had no power ex post facto to treat him as dismissed as from a date prior to the hearing by them of an application to confirm the purported dismissal by the Chief Constable;

(2.) that it could not be said that by appearing before the Watch Committee the appellant must be taken to have abandoned his notice of resignation;

(3.) that the appellant was not limited to the right of appeal to the Secretary of State given by the Police Appeals Act, 1927; and therefore (4.) that he was entitled to the declarations claimed.

Semble that the proceedings before the Watch Committee were contrary to natural justice owing to the presence of the Chief Constable during the Committee's deliberations on the appellant's appeal.

Where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null and void.

APPEAL from Singleton J. in an action tried with a jury.

The facts, which are stated in detail in the judgments, were, shortly, these: The plaintiff, an ex-sergeant of the Liverpool

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police force, sued the defendants, the Chief Constable of Liverpool, a police superintendent, and the members of the Watch Committee of Liverpool, claiming declarations that he had not, as the defendants alleged, been validly dismissed from the force, that he had duly resigned, and that he was therefore entitled to be repaid certain deductions that had been made from his pay while in the Liverpool police force.

The plaintiff joined the Liverpool police force in 1919 and became sergeant in 1933. On July 27, 1933, he handed in the statutory month's notice of resignation. On August 8, however, charges were preferred against him of offences against discipline; on August 14 the Chief Constable, after an inquiry, purported to dismiss him; and on August 29, that is, five days after his resignation, as he alleged, became operative, the Watch Committee, at a meeting at which the Chief Constable was present, purported to dismiss the plaintiff's appeal from the Chief Constable's sentence of dismissal. The Watch Committee thereupon refused to repay to the plaintiff the accumulated rateable deductions from his pay amounting to 116*l*. 13*s*. 6*d*.

SINGLETON J., on the jury's answers to certain questions, gave judgment for the defendants, holding that the dismissal of the plaintiff was valid.

The plaintiff appealed.

Wooll (*Heriot-Hill* with him) for the appellant. Sect. 10 of the Towns Police Clauses Act, 1847, provides (inter alia) that " no constable appointed under this or the special Act shall resign his office, or withdraw himself from the duties thereof, unless expressly allowed so to do in writing by the commissioners or by the superintendent constable, or until after he has given to such superintendent constable one month's notice . . . . " Acting under the provisions of that section the appellant sent in his resignation on July 27, 1933, and accordingly it became effective one month from that date. That being so, the purported dismissal of the appellant on August 29 by the Watch Committee (which body alone has power to dismiss a borough constable; see s. 191, sub-s. 4, of the Municipal

Corporations Act, 1882) was a mere nullity, the resignation having by that date become operative. It is true that the Chief Constable purported to cancel the notice of resignation, but he had no power to do so, for, as pointed out, it is only the Watch Committee that can dismiss. In any view the proceedings before the Watch Committee were vitiated by the fact that the Chief Constable as the real prosecutor had no right to be present when they were deliberating; the Watch Committee when so acting was a judicial body, and a series of decisions has established that the prosecutor must not be present so as even indirectly to influence their decision. The resignation having taken effect, the appellant is entitled under s. 20, sub-s. 1, of the Police Pensions Act, 1921, which provides that "where a member of a police force, not having been dismissed or required to retire as an alternative to dismissal, leaves the force without a pension or gratuity, the police authority . . . . shall pay him the whole of the rateable deductions which have been made from his pay," to have paid to him those deductions.

Maxwell Fyfe K.C. and *F. E. Pritchard* for the respondents. With regard to the contention that the proceedings of the Watch Committee were vitiated by the Chief Constable's presence, it has to be borne in mind that an administrative body which is invested with quasi-judicial functions, is not in the same position as a purely judicial body. In the case of an administrative body where no rules are prescribed for the conduct of its business, the test in every case is, Has it in the particular matter observed the substance of justice? In the present case it did so. In former days the judge who tried a case took part with the other judges when the matter came before the Court in banc, and it was never suggested that such a course was improper. Again, in criminal appeals the judge who tried the case frequently makes a report to the Court of Criminal Appeal, and the parties are not allowed to see it; yet no one has contended that this has in any way vitiated the proceedings. *Local Government Board* v. *Arlidge* (1) decided that an appellant to the Board was not entitled as a

(1) [1915] A. C. 120.

condition precedent to the dismissal of his appeal either to be heard orally or to see the report made by the Board's inspector. See also the observations of Swift J. in *Marriott* v. *Minister of Health.* (1) In such matters the position is entirely different from proceedings in public Courts, as to which it has been said that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *Rex* v. *Sussex Justices.* (2)

Further, this action is entirely misconceived. To meet such a case as this a code is laid down by the Police Appeals Act, 1927, which in terms gives a right of appeal to the Secretary of State by a member of the police force who has been dismissed or required to resign as an alternative to dismissal. That was the only remedy open to the appellant and it was not pursued. It is said, however, that the resignation of the appellant had become an accomplished fact. That is not so, for, by appealing to the Watch Committee, the appellant thereby abandoned or must be taken to have withdrawn his resignation, and elected to treat himself as still a member of the force; and the Watch Committee having adjudicated on that appeal its decision can be questioned only by prerogative writ and not by an action claiming a declaration: see *Everett* v. *Griffiths.* (3)

Wooll in reply. The appellant was compelled to go to the Watch Committee by reason of the charges made against him. That cannot be taken as a waiver of the formal resignation which operated automatically. It was decided in *Wallwork* v. *Fielding* (4) that the Police Act, 1919, and the Regulations made thereunder have not impliedly affected the provisions of s. 191 of the Municipal Corporations Act, 1882, under which the sole right to dismiss a borough constable is in the Watch Committee. Further, the appeal given by the Police Appeals Act, 1927, does not impose on the Secretary of State any power analogous to the holding of a full inquiry; the appeal is to a higher executive officer, not to a judicial authority.

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(1) (1935) 154 L. T. 47, 50.
(2) [1924] 1 K. B. 256.
(3) [1924] 1 K. B. 941.
(4) [1922] 2 K. B. 66.

It is said that the remedy, if any, open to the appellant was by prerogative writ. As to that it is submitted that neither mandamus nor certiorari would have been of any use, and therefore the only remedy open to him was by an action claiming a declaration. [He also cited *Andrews* v. *Mitchell* (1); *Law* v. *Chartered Institute of Patent Agents* (2); and *Rigby* v. *Connol.* (3)]

Cur. adv. vult.

1937. March 23. The following judgments were read :—

GREER L.J. This is an appeal by Ernest Cooper, an ex-sergeant of the Liverpool police force, from the decision of Singleton J. after a trial before that learned judge and a special jury who answered certain questions submitted to them by the learned judge. The appellant claimed in his writ (inter alia) a declaration that the hearing of an appeal by him by the Watch Committee of the City of Liverpool was not legally valid, a declaration that the confirmation by the Watch Committee of the findings of the defendant Wilson, who was the Chief Constable of Liverpool, and sentence were not legally valid, a declaration that the defendant Wilson and/or the Watch Committee were not entitled to retain the rateable deductions from the plaintiff's pay, and an order for the payment thereof to the plaintiff.

The appeal raises questions of considerable public importance, not only to the City of Liverpool but to every borough whose police affairs are managed by a Watch Committee. Before stating the facts on which this appeal turns, and the contentions of the appellant, it seems to me to be convenient to refer to the statutes affecting the position of a police sergeant in the police force. By s. 10 of the Towns Police Clauses Act, 1847, a constable is authorized to resign his office on giving to his Superintendent Constable one month's notice. The common law meaning of one month is a lunar month, that is to say, twenty-eight days. Sect. 26 of the County and Borough Police Act, 1859, gives to the Watch Committee of any city, borough, district or place, power to suspend a constable whom they shall think remiss or negligent in the discharge of his duties or otherwise unfit for the same. The Municipal Corporations Act, 1882, s. 191, gives to the Watch Committee or any two justices jurisdiction to suspend, and to the Watch Committee power to dismiss any constable whom they think negligent in the discharge of his duties or otherwise unfit for the same. The Police Pensions Act, 1921, s. 20, provides that where a member of a police force who has not been dismissed or required to retire as an alternative to dismissal leaves without a pension or gratuity, the Police Authority shall pay him the whole of his rateable deductions, that is to say, the deductions which had been made from his pay in respect of his contribution to the Pension Fund. The Police Appeals Act, 1927, authorizes a member of the police force who has been dismissed or required to resign as an alternative to dismissal a right of appeal to the Secretary of State, and the Police Act, 1919, s. 4, gives to the Secretary of State power to make regulations as to the government, etc., and conditions of service of the members of all police forces within England and Wales. None of these later statutes contains any repeal of the statutes which gave to the Watch Committee the power to dismiss a constable, or the power to suspend a constable, and it has been decided, and I think rightly decided, in *Wallwork* v. *Fielding* (1) that the statute of 1919 cannot be construed as an implied repeal of the statutory provisions with regard to the dismissal or suspension of a member of the police force. I think it is beyond dispute that if it had been intended to repeal the power which is confined to the Watch Committee in the city to dismiss a constable, or to empower a Chief Constable to dismiss, this would have been done by express provision in some later statute. It was admitted that there is no statute giving power to a Chief Constable to dismiss.

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(1) [1905] A. C. 78.

(2) [1919] 2 Ch. 276.

(3) (1880) 14 Ch. D. 482.

In *Wallwork* v. *Fielding* (1) Lord Sterndale expressly said that under s. 191, sub-s. 4, of the Municipal Corporations Act, 1882, no one has power to dismiss a constable except the

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(1) [1922] 2 K. B. 66.

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Watch Committee. In the case cited it was indicated that it was for this reason that the right of suspension was reserved to justices as well as to the Watch Committee. The headnote of that case reads as follows: " A borough police constable sued the Watch Committee to recover his pay for a period during which he had been suspended by the defendants from duty for an offence against discipline. The defendants alleged that the plaintiff was properly suspended during that period, and was therefore not entitled to pay. The plaintiff contended that the defendants had no power to suspend him, because the power of suspension conferred upon them by s. 191, sub-s. 4, of the Municipal Corporations Act, 1882, was impliedly repealed by the Police Act, 1919, and the Regulations made thereunder by the Secretary of State: Held, that, there being nothing in the Act of 1919 and the Regulations thereunder which dealt in any way with suspension, the power conferred by the Act of 1882 upon the Watch Committee or two justices was not impliedly repealed, and the defendants had power to suspend and to stop the plaintiff's pay during the period of suspension." In the course of his judgment Warrington L.J. uses these words (1): " In order that a subsequent statute, not expressly repealing a previous Act, or the provisions of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together. The principle was expressed by A. L. Smith J. in *Kutner* v. *Phillips* (2) in the passage quoted by Scrutton L.J. in *Flannagan* v. *Shaw*. (3) He said this: ' Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim " Legis posteriores contrarias abrogant " applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.' In my opinion there is no such inconsistency here. Suspension and disciplinary procedure, followed by punishment, seem to me to be two entirely different things." These observations seem to me to show that the power to make Regulations under s. 4, sub-s. 1, of the Police Act, 1919, does not impliedly repeal s. 191, sub-s. 4, of the Act of 1882. The Regulations, in my judgment, must be read as applying to the way in which the Watch Committee are to exercise their powers in a borough, and to the way in which the Chief Constable is to exercise his similar powers in a county. They cannot be used to repeal a provision which Parliament has expressly left applicable to boroughs.

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(1) [1922] 2 K. B. 73.
(2) [1891] 2 Q. B. 267, 271, 272.
(3) [1920] 3 K. B. 105.

The Regulation affecting the present case is Regulation 20, clause 2, which reads as follows : " (2.) In the case of a borough police force, the decision of the Chief Officer of Police shall, subject to any general directions of the Watch Committee, be either (i.) to dismiss the case, or (ii.) to remit the case to the Watch Committee for further hearing, or (iii.) to award a punishment as provided in Regulation 21 : Provided that any punishment other than a caution shall be subject to confirmation by the Watch Committee, and any member of the Force who feels aggrieved by a decision of the Chief Officer of Police awarding a punishment shall be entitled to appear before the Watch Committee to appeal against such decision upon giving notice in writing to the Chief Officer of Police forthwith or at any later date not less than three clear days before his case is to be laid before the Committee." If the proper construction of this clause involves that a power of dismissal is given to the Chief Constable it would be ultra vires. I do not think, however, that it is ultra vires. It is only a Regulation as to the procedure to be adopted to bring the question of dismissal to a hearing before the Watch Committee. The power to make Regulations as to the government of the police force seems to me to extend no farther than a power to make Regulations with regard to the way in which the statutory authority in borough police forces shall exercise its powers, that is, in the case of petty offences the Chief Constable, and in the case of serious offences involving suspension or dismissal the Watch Committee. An application to the Watch Committee to discharge a constable by reason of the Regulations takes the form of an application for confirmation of the Chief Constable's decision, but it is none the less an application to the Watch Committee to dismiss, and must be heard and determined by the Watch Committee acting judicially or quasi-judicially. Until the preliminary decision of the Chief Constable comes before the Watch Committee for confirmation it cannot have the effect of operating as a dismissal. It is only on confirmation by the statutory body, to whom alone is given the power to dismiss, that any dismissal can operate. It seems to me clear that the Watch Committee have no power to dismiss a constable who has already terminated his service by due notice, nor can they ex post facto decide that they would treat him as dismissed as from a date prior to the hearing of an application to confirm the decision of the Chief Constable.

I have for convenience already stated the statutory provisions which have to be considered in this appeal, and, having regard to the arguments that have been addressed to us, it may be convenient now to state in chronological order how the questions between the plaintiff and the Watch Committee arose. The plaintiff was a policeman who for rather more than thirteen years before July, 1933, had served in the Liverpool police force with credit, and, so far as evidence was given before the Chief Constable and before the Watch Committee, without reproach. He had been twice promoted and for two years before July, 1933, he had been serving in "E" Division, having previously, I think, been in "C" Division. According to his own statement he did not find himself so comfortable in "E" Division as he had been in the Division in which he was previously serving. On July 27 he sent in his resignation in the following words: "I beg to report that I am desirous of resigning from the Liverpool City Police, and tender one month's notice commencing 27.7.33 and expiring 24.8.33. My reason for doing this is because I intend going to reside with a relative abroad. E. Cooper, Sgt." Chief Inspector Nichols was at the time acting Superintendent of the " E " Division, and on the same date he submitted to Superintendent Hughes what he describes as " this application," adding that he had interviewed the sergeant and had been assured that his wife had full knowledge of the steps he was taking. The Chief Inspector adds in his letter : " I intimated I should like to see her but he prefers that if this course is necessary that it should be by the Chief Constable. He appears to be dissatisfied with ' E ' Division but affirms that no enquiry or action will prevent him from taking the step intended. He stressed the point that no family difficulty or domestic relations was responsible for his action. He contemplates going to Switzerland." The notice of resignation and the Chief Inspector's letter were sent on to the Chief Constable on July 31. On August 1, the Chief Constable noted in the margin that the resignation was accepted, adding : " His reasons for resigning are his own and apparently there would not appear to have been any conduct on the sergeant's part calling for disciplinary action." On August 3 he wrote across this marginal note " cancelled." I take this to mean that the Chief Constable was then cancelling his note that there did not appear to have been any conduct calling for disciplinary action. In the course of his evidence at the second trial the Chief Inspector said that before he saw Mrs. Cooper he told Cooper he would like to see his wife, but it was with the idea of keeping him in the force. He also said that Cooper had told him that his family relations were all right at home. Thereafter Superintendent Rogers of the Police Headquarters and Inspector Nichols saw the plaintiff's wife and took statements from her. These were communicated to the Chief Constable, who then, on August 3, ordered an inquiry. This inquiry was at first fixed for August 12, but was adjourned at the request of the plaintiff to August 14. The following charges were then formulated by Superintendent Hughes as the charges into which they desired the inquiry to be held by the Chief Constable : " (1.) Discreditable conduct, that is to say, he acted in a manner likely to bring discredit on the reputation of the force, in that he failed to subscribe to the maintenance of his wife and two children at 41 Dorothy Street, between July 20, 1933, and August 6, 1933, by leaving them in a destitute condition (Discipline Code, 1). (2.) Falsehood, that is to say, he wilfully made a false verbal statement to Chief Inspector Nichols, to whom he stated that the domestic relations with his wife were all that could be desired, about 11 A.M. on Monday, July 31, 1933 (Discipline Code, Section 5, *b*). (3). Neglect of Duty, that is to say, he failed to report a matter it was his duty to report, that is, that after being granted fourteen days leave from the 22/7/33, he neglected to report that he would not be sleeping at his home s/a if required for duty. (Discipline Code, Section 4, *f*)."

After hearing evidence the Chief Constable found Cooper guilty on all charges, and purported to dismiss him. In doing so he, in my judgment, misconceived his powers under the Regulations. Regulation No. 20 of the Police Regulations of August 20, 1920, made under s. 4 of the Police Act, 1919, has already been quoted. It is worthy of note that any punishment other than a caution is subject to confirmation by the Watch Committee. It seems clear that this was not intended to be inconsistent with the statutory provision to the effect that the power of dismissal is vested in the Watch Committee and not in the Chief Officer of the Police. If it means that the dismissal applies until disaffirmed on appeal it would be contrary to the statute to which I have referred, and would be ultra vires; but, in my judgment, Regulation 20 is a procedural regulation providing for the mode in which the question which can only be decided by the Watch Committee is to come before them. There can be no doubt that the power of dismissal in boroughs remains solely in the Watch Committee. The Act of 1919 does not expressly or impliedly repeal the statute which says that the right of dismissal is to be in the Watch Committee. If it had been intended to give the power of dismissal to the Chief Constable I would have expected express provisions to that effect, and there are no such provisions in the Act of 1919.

At the hearing of the case at the Liverpool Assizes some criticism was put forward by counsel for the plaintiff of the

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way in which the inquiry was held by the Chief Constable. Such criticism was mainly concerned with the Chief Constable's failure to allow the plaintiff to give an explanation at a meeting with the Chief Constable before the inquiry; but at the hearing of the case before us Mr. Wooll on behalf of the plaintiff admitted that he was not justified in making any complaint about the conduct of the inquiry by the Chief Constable. Under the statute already referred to, if the plaintiff resigned he was entitled as of right to have the pension deductions from his salary, which were his property, to be repaid to him; but if he ceased to be a constable by reason of dismissal the Watch Committee, as the Police Authority, had power to pay these deductions to his wife for the keep of herself and her children. It is difficult to explain the attitude of Chief Inspector Nichols after he had taken the statement from Mrs. Cooper otherwise than as indicating that he wished to bring about a result which would deprive the plaintiff of his right to be paid the amount of the deductions. Unfortunately for what I think were the objects of the Chief Inspector, Sergeant Hughes and Sergeant Rogers failed to realize the fact that the notice of resignation would run on until August 24, and that after that date the plaintiff would cease to be a member of the force. It seems to me that, when the Watch Committee met on August 29, the plaintiff was no longer a member of the force, and the Watch Committee therefore could not ex post facto discharge him as from August 14. If they could discharge a police officer who had left the force for five days, they could equally discharge him if he had been out of the force for six months. I think they had no such power, and they were unable in law to decide that an ex-member of the force should be treated as discharged, because while he was still a member of the force he was guilty of conduct that would have entitled the Watch Committee to discharge him. On this ground it seems to me that the order of the Watch Committee dismissing the plaintiff's appeal and dismissing him from the force was one that they were not entitled to make, and was a mere nullity.

It was contended for the respondents that by appearing before the Watch Committee the plaintiff must be taken to have withdrawn his notice of resignation. This argument has, in my judgment, no weight. If it was desired to obtain his discharge before the expiration of his notice, a special meeting of the Watch Committee could have been called on some date between August 14 and 24 so as to enable the Watch Committee to deal with the matter before the expiration of the notice. This view of the case is sufficient to determine the appeal in the plaintiff's favour unless we come to the conclusion either (I.) that however unauthorized the dismissal might be, the plaintiff's sole right was to appeal to the Secretary of State, or alternatively, to apply by certiorari to quash the order of dismissal. I do not think either of these contentions apply to a case like the present. It would be idle for a plaintiff who is alleging that he has never been dismissed to appeal to the Secretary of State, nor do I think that the fact that that is a remedy which he could take prohibits his access to the Court for a declaration that his dismissal was invalid, nor do I think that the power which he undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal. The power of the Court to grant declarations has been greatly extended in recent years, and according to the judgment of Bailhache J. in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1) declarations may be granted in all cases where there is a dispute between a plaintiff and a defendant and the claim for a declaration is a convenient method of dealing with such dispute. I think the view as to declaratory judgments that finally prevailed is that which is stated by Lord Sterndale in *Hanson* v. *Radcliffe Urban District Council.* (2) These are the words of Lord Sterndale: "Further, the defendants are a statutory body, which has purported to interfere with a contract made between two parties, and I adhere to my judgment in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (3), in which, although I had the misfortune to disagree with Lord Wrenbury, I said that a number of declarations had been made, and, in my opinion, rightly made, as to the rights of parties under contracts, without waiting for some event to happen, as, for instance, for a ship to arrive at its destination, in order to determine the result of the contracts and what the exact causes of action might be. In my opinion, under Order xxv., r. 5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide. I think that the order of Russell J. was also right on this point, and that the appeal should be dismissed."

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(1) [1915] W. N. 38, affirmed in C. A. [1915] 2 K. B. 536.

(2) [1922] 2 Ch. 490, 507.

(3) [1915] 2 K. B. 536.

As I have said, if I am right it is unnecessary for me to form any judgment on the more important question raised by the appellant's contention that the proceedings before the Watch Committee were contrary to natural justice; but as this point was fully argued, it seems desirable that I should deal with it. When the plaintiff came into the presence of the Watch Committee to present his case in resisting confirmation of the Chief Constable's decision and asking for its reversal, he saw before him seated at the table opposite to where he would be giving his evidence, the deputy chairman, Mr. Alderman Eills, and seated next to him the Chief Constable, and next to the Chief Constable the deputy Chief Constable, and to any outsider who happened to come in with him it would seem as if the Chief Constable and the deputy Chief Constable were placed in a position where they would act with the Committee as judges of the police application for dismissal and of the plaintiff's appeal against the findings of the Chief Constable. The proceedings were opened by a statement read by the Chief Constable. In the course of his opening statement the Chief Constable again repeated the mistake made by the police of treating the plaintiff's notice of resignation as an application to resign. I cannot read the Chief Constable's statement as other than an opening statement by an applicant for an order of dismissal and by a respondent to the appeal, especially the passage referring to the third charge, and the concluding paragraph. Both learned counsel who addressed the Court on behalf of the respondents described the Chief Constable as a second respondent. This seems to me a not inaccurate description of the Chief Constable's position in relation to the plaintiff's appeal, and nothing could be said with regard to him if he had said: "I am interested in the result of this appeal inasmuch as my decision is being attacked, but I do not propose to take any part in the arguments before this tribunal except by stating what my decision was." I think he went beyond that and in so doing treated himself as one of the parties in the proceedings before the Committee. In addition to the case made by Mr. Wooll with regard to the Chief Constable's presence in the tribunal, he made two other points which I think were not well founded. He complained that when the plaintiff said that he had to contribute to the support of his father and mother the deputy chairman said: "He has just thought of that one; we are too old in the head to believe it," or words to that effect. The words proved to have been used by Alderman Eills, and so found by the jury, were: "He has just thought of that one. We are too old in the head to believe that one." I see no reason for holding that there was anything contrary to natural justice in this remark of the chairman, who was a man of experience and entitled to express, as he appears to have done, his honest opinion. I also attach no importance to the suggestion that the refusal to permit the plaintiff to call Mrs. Gray and his mother-in-law was contrary to natural justice. Mrs. Cooper's allegation with regard to Mrs. Gray had been disproved in the inquiry, and there could be no object in calling her except to say again what she had said before the Chief Constable. With regard to the plaintiff's mother-in-law, what the plaintiff wished to happen was that she should be called in order that he might cross-examine her. This, of course, he was not entitled to do. But I think he is fairly entitled to complain that the presence of one of the respondents to his appeal on the Bench when they were deliberating as to whether they would or would not affirm his sentence was contrary to natural justice, and that it thereby

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invalidated the decision of the Watch Committee and entitled him to have a declaration to that effect.

I think the cases relied upon by Mr. Wooll, *Rex* v. *Essex Justices* (1); *Reg.* v. *London County Council* (2); and *Reg.* v. *Brixton Income Tax Commissioners* (3) establish the proposition that if the conduct of the justices is such as to give rise to a reasonable suspicion that justice does not seem to have been done, then their decision should be set aside. It is noticeable that in all those cases it was established to the satisfaction of the Court that the persons whose presence was complained of when the tribunal was considering its decision in fact took no part in the decision, and in the case of the surveyor of taxes it was considered necessary to pass a special Act of Parliament to do away with all objections to his being present with the taxing authority when they were considering their decision. I ask myself what would any one have thought who came into the room where the Committee were sitting, after the plaintiff had gone out while they were considering their decision, and found sitting on the Bench with the Committee one of the respondents to the appeal who had opened the case, though he had left the calling of the witnesses to Superintendent Hughes. Such a person, if reasonable, would have been likely to say to himself: "There has been an opportunity here for one of the parties to influence the judgment of the Committee, and it looks as if justice may seem not to have been done."

The case of *Andrews* v. *Mitchell* (4) seems to me to support the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void. *Hill* v. *Tothill* (5) supports the contentions contained in the other justices' cases. *Pasmore* v. *Oswaldtwistle Urban Council* (6), which was relied upon by the respondents, seems to me, with respect, to have no bearing on anything we have to decide in the present case. I think on this ground also the plaintiff ought to have succeeded in obtaining a declaration of the invalidity of the order made by the Watch Committee.

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(1) [1927] 2 K. B. 475.
(2) [1892] 1 Q. B. 190.
(3) (1913) 29 Times L. R. 712.
(4) [1905] A. C. 78.
(5) [1936] W. N. 126.
(6) [1898] A. C. 387.

One or two other matters remain to be mentioned. The case was tried in the first instance before Hilbery J. and a special jury, and after it had proceeded for several days the defendant, Mrs. Whiteley, said she was no longer content that her case should be treated as the same as that of the other defendants, and she wished to sever in her defence. The case was accordingly adjourned, and had to be tried again at the next Assizes by Singleton J. At the renewed hearing certain evidence was given by Mrs. Whiteley, but Mr. Wooll, for the plaintiff, receiving some indications from the jury that they were not inclined to attach any weight to her evidence, expressly disclaimed in the appeal asking the Court to accept any part of her evidence. On all the questions submitted to the jury the answers were, except in the case of questions 8, 9 and 15, favourable to the defendants. Questions 8 and 9, with the jury's answers, are as follows: (8.) Did the deputy chairman impute to the plaintiff that he was lying? Answer: Yes. (9.) (*a*) Did the plaintiff apply to call Mrs. Gray? Answer: Yes. (*b*) Was such application refused? Answer: Yes. As I have said, I attach no importance to these answers as bearing on the validity of the order made by the Committee. It should be added that the jury found in answer to question 15 that the defendant Hughes assaulted the plaintiff just after the inquiry before the Chief Constable, and awarded him 5*l.* damages. This answer also does not seem to me to have any bearing on the questions we have to determine in this appeal.

For the reasons I have stated, I think the appeal should be allowed, and judgment entered for the plaintiff declaring that the decision of the Watch Committee on August 29, 1934, was invalid, that the plaintiff is entitled to be paid the aggregate of the deductions from his salary, and interest at 4 per cent., and that the plaintiff should have the costs of the trial before Singleton J. and the costs of the appeal. Mrs. Whiteley has not appealed against the order made against her for costs and we cannot, therefore, deal with it. I do not think there ought to be a new trial in respect of the damages claimed for libel. The occasion was clearly privileged, and the jury found that the Chief Constable was not actuated by malice; and the question was not argued in this Court by Mr. Wooll.

SCOTT L.J. In this case the appellant, who was plaintiff in the Court below, appeals from the judgment of Singleton J. at Liverpool Assizes after trial before a special jury. He appeared before us under the Poor Persons Rules, his case being ably argued by Mr. Edward Wooll. The appellant was a member of the Liverpool City Police Force, having joined it in 1919, and reached the rank of third class sergeant in 1933. On July 22 of that year he was given a fortnight's leave of absence, to complete his annual leave, and on July 27, having decided to resign, he handed in the statutory month's notice of resignation, as prescribed by s. 10 of the Towns Police Clauses Act, 1847, incorporated in the Liverpool Corporation Act, 1921, by s. 6 of that Act: this was due to expire on August 24. On August 8, however, the police preferred against him certain charges of offences against discipline, which arose out of the state of mutual hostility prevailing in his domestic life between his wife and himself. On August 14 the Chief Constable, after an inquiry in which he heard evidence upon the charges, purported to sentence him to dismissal; and on August 29, five days after his resignation was due to come into effect, the Watch Committee, the head disciplinary authority of the force and the domestic tribunal of appeal under the Police Regulations, 1920, purported both to dismiss his appeal and to pass upon the Chief Constable's sentence of dismissal the statutory confirmation required to make it effective. Thereafter the Watch Committee refused to hand over to him his accumulated rateable deductions from pay amounting to 116*l.* 13*s.* 6*d.*, and in fact handed the whole amount over to his wife. The appellant thereupon brought an action against Mr. Wilson, the Chief Constable, Mr. Hughes, a Police Superintendent, and the members of the Watch Committee who had taken part in the hearing of August 29 (the third and fourth defendants being included in error), alleging that neither hearing was in accordance with the said Regulations, and that both were conducted contrary to the principles of natural justice, and claiming declarations that neither of the hearings had been legally valid, that he had not been validly dismissed, and that his resignation had operated, and asking for consequential payment of the above sum of 116*l.* 13*s.* 6*d.* There were also claims for damages for libel and conspiracy. The attack upon the validity of the hearing before the Chief Constable as contrary to natural justice and the allegations of libel and conspiracy were disposed of adversely to the appellant in the Court below and were not raised in the appeal before us. There was also a claim against Police Superintendent Hughes for damages for assault. On this the jury found in the appellant's favour with 5*l.* damages, and judgment was entered for him without costs. Nothing arose in the appeal in regard to this matter. The jury were not asked to give any general verdicts, but several detailed questions, agreed between counsel, were put to and answered by them. Upon these answers the learned judge entered judgment for the defendants (other than Hughes) and dismissed the action; hence the appeal.

Before us the main contentions were, first, that the resignation of the appellant duly took place in accordance with his notice so that on August 24 he ceased to be a member of the force, and his right to payment of the 116*l.* 13*s.* 6*d.* then definitely and finally arose; and, secondly, that the hearing before the Watch Committee was legally invalid.

The case raises questions of general importance under the borough Police Acts in regard to voluntary resignations, to the powers and duties of Chief Constables and Watch Committees for purposes of discipline, and to the correlative rights of police officers when charged with police offences. Perhaps the most important aspect of the appeal attaches to the quasi-judicial functions of the Watch Committee exercised under Regulation 20 of the Regulations made by the Secretary of State under s. 4 of the Police Act, 1919.

The appellant's record was clean, and there never had been anything against him till the matters in question in the

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action, except one " Caution " and one " Warning "—apparently a milder form of " Caution." These two " Cautions " were for being late on parade, and Regulation 21 directs that a " caution shall not be entered on a man's conduct sheet " ; according to the practice of the Liverpool force it never appeared in a man's record. He was eleven years in " C " Division of the City force and was then moved to " E " Division. There he became dissatisfied in a vague way with life in the Division, and this reason, together with unhappiness in his married life, led him to give the month's notice of resignation from the force, pursuant to s. 10 of the Town Police Clauses Act, 1847, to which I have already referred. In his notice he stated as his reason that he intended " going to reside with a relative abroad." Chief Inspector Nichols, as acting Superintendent, surprised at his wanting to resign, asked him whether domestic trouble was responsible for his action, and he replied, untruly, that it was not so. Nichols reported the question and answer on the form of notice. The notice was in due course submitted to the Chief Constable who, on August 1, noted his " acceptance " of it in the margin, and added : " His reasons for resigning are his own, and apparently there would not appear to have been any conduct on the Sergeant's part calling for disciplinary action." Superintendent Rogers, however, on August 2, interviewed his wife, and she disclosed the fact that there was trouble, made charges against him of infidelity (naming a Mrs. Phœbe Gray), of stinting her with money for herself and the two children, and of sleeping out at night during his leave and only returning to the house next morning. Superintendent Rogers duly sent in his report and attached a long sort of proof of evidence by the wife against her husband in regard to his conduct towards her. This report came before the Chief Constable, who thereupon cancelled his " acceptance " written on the appellant's notice of resignation (which had not yet been returned to the appellant). According to the evidence before the jury at the trial before Singleton J. there had been previous separations and reconciliations, but in July, 1933, the appellant had made up his mind to get his wife to agree to a permanent separation, and himself to go to live in Switzerland, and consulted a solicitor about a voluntary separation. He, however, then acted in a way which would certainly be open to moral censure in the absence of grave provocation from his wife, for he proceeded without her consent to remove and sell most of the furniture from the joint home. When Chief Inspector Nichols called at the house on August 5 he found it "practically devoid of furniture." From the wife's statement about the appellant not sleeping at home during his leave, an official conclusion was drawn that he had broken the rule of the force about always when off duty for a time leaving an effective address so as to facilitate recall in emergency.

On August 8, on the instructions of the Chief Constable, the appellant was charged with three offences under the Discipline Code contained in the Appendix to the Police Regulations, 1920, to which I have already referred. In accordance with Regulation 15 the three charges were formulated upon the regular "Misconduct Form." The charges were as follows: "(1.) Discreditable Conduct—that is to say, he acted in a manner likely to bring discredit on the reputation of the force, in that he failed to subscribe to the maintenance of his wife and two children at 41 Dorothy Street, between July 20, 1933, and August 6, 1933, by leaving them in a destitute condition. (Discipline Code s. 1.) (2.) Falsehood—that is to say, he wilfully made a false verbal statement to Chief Inspector Nichols, to whom he stated that the domestic relations with his wife were all that could be desired, about 11 A.M. on Monday, July 31, 1933. (Discipline Code s. 5 (*b*).) (3.) Neglect of Duty—that is to say, he failed to report a matter it was his duty to report, i.e. that after being granted fourteen days leave from 22–7–1933, he neglected to report that he would not be sleeping at his home s/a if required for duty. (Discipline Code s. 4 (*f*))." The Misconduct Form was in due course documented, as required by that Regulation, with the appellant's notice of resignation, the various reports submitted by his superior officers, including the detailed statement of complaints taken from the appellant's wife and also a statement from a police officer in the Birkenhead force, his wife having alleged that he had caused a disturbance in the street there where her parents lived. The Birkenhead police statement, however, entirely exonerated him from this last allegation. On August 14 the Chief Constable held the inquiry called for by Regulation 18, which the jury, in effect, found was fairly and properly conducted, and at it, after hearing the witnesses, he decided that all three charges were proved. As a punishment he passed sentence of dismissal. On sentence being passed by the Chief Constable, the appellant was forthwith posted in the day's orders as having been dismissed. This, in my view, was incorrect procedure, because it was done without waiting for confirmation by the Watch Committee, although under the proviso in Regulation 20 every major punishment is "subject to confirmation by the Watch Committee, and any member of the force who feels aggrieved by a decision of the Chief Constable awarding a punishment, shall be entitled to appear before the Watch Committee to appeal against such decision." This, for reasons I will give later, means in my opinion that there is no operative sentence until the confirmation by the Watch Committee has taken place. The appellant, being aggrieved by the Chief Constable's decision, on August 17, 1933, gave notice of appeal, and his appeal was duly entered in accordance with the Regulations upon the Misconduct Form above mentioned. On the same and the next day he was called upon to deliver up all official papers, uniform, etc., in his possession, and did so. It is plain that this action of the police was taken on the erroneous assumption that his dismissal had taken effect, but it does not affect the appeal before us. On August 29 the Watch Committee heard and dismissed his appeal to them, and thereafter, purporting to act under the power given to them by s. 20, sub-s. 2, of the Police Pensions Act, 1921, as amended by s. 2, sub-s. 2, of the Police Pensions Act, 1926, handed over the whole of his fund of rateable deductions, amounting to 116*l.* 13*s.* 6*d.*, to his wife. To this money he would have had an absolute statutory right had he resigned, and it was common ground that it would have been paid over to him on his leaving the force if his notice of resignation had been treated as effective. His certificate of discharge was thereafter handed to the appellant, on which it was stated that he had been dismissed. The only other relative fact to be noted is that on September 4 the appellant contemplated an appeal to the Secretary of State under the Police (Appeals) Act, 1927; but he never formally filled in the official form which he was informed in reply he could obtain on calling at the office.

The appellant's case at the trial before Singleton J. and the special jury for impugning the validity of the ultimate dismissal by the Watch Committee was put on various grounds. Several of these were eliminated by the answers of the jury, but two important contentions survived for our consideration. They raise independent issues, but to some extent involve an examination of the same statutory groundwork. The appellant's first contention was that his notice of resignation operated and that he accordingly left the force on its expiration. The supporting argument was that in a borough a Chief Constable cannot himself dismiss a constable, but can only make a provisional decision and sentence, and that neither has any effect unless and until confirmed by the Watch Committee, the final disciplinary authority in a borough police force; that there is no provision, express or implied, in any borough Police Act which has the effect of making a notice of resignation under s. 10 of the Towns Police Clauses Act, 1847, conditional upon the continued absence of any disciplinary complaint against the officer desiring to resign, and no provision that if a disciplinary charge is preferred it shall suspend the currency of such a notice of resignation already given; or at any rate that no such implication can arise unless the disciplinary authority can show that it was impossible to carry through the statutory proceedings making the punishment effective, including confirmation by the Watch Committee, within the time available before the expiration of the notice: that under the terms of Regulation 20 (2.) there was no dismissal until confirmation by the Watch Committee of the Chief Constable's provisional sentence of dismissal; that there was nothing to interrupt the running of the appellant's notice of resignation, that it ran out in accordance with its tenor, and that consequently the appellant ceased on August 24, the day of its effluxion, to be a member of the Liverpool City Force, and could not thereafter be dismissed from it. This contention calls for an investigation into the borough Police Acts.

The second contention was alternative—that if the appellant was at the date of the hearing by the Watch Committee still a member of the force, the proceeding before the Committee was an appeal by way of rehearing from the Chief Constable, a judicial or quasi-judicial trial of the three charges against the accused; that it was in certain particular respects conducted in a way contrary to natural justice and was therefore a nullity, with the result that there was never any confirmation by the Watch Committee of the provisional sentence of dismissal by the Chief Constable, and the notice of resignation, even if either conditional or suspended, ran out as soon as any legal and effective prosecution of the charges against the appellant came to an end—namely, immediately after the hearing of August 29, after which the Watch Committee, naturally treating their own decision as effective, made no attempt to take any further action.

It will perhaps help to make clear the limited scope of the appellant's actual contentions in the action and before us, if I draw attention to certain wider aspects of the case which perhaps might have been, but were not raised as arguable contentions on his behalf. It was not, for instance, contended at any stage that s. 4 of the Act of 1919 did not delegate to the Secretary of State legislative authority to make a regulation in the terms of Regulation 20, conferring judicial powers on the Watch Committee, with the necessary consequence that conviction by it of a constable charged with even a very grave offence would be res judicata, estopping the accused constable from thereafter bringing up the issue before a court of justice. Nor was the broad contention put forward that in the hearing before the Watch Committee taken as a whole the appellant never got a really satisfactory trial, especially having regard to the inherent difficulty of the issues, for an appellant conducting his own case without legal assistance, and particularly if it be borne in mind that all three charges against him depended directly or indirectly on a careful sifting of the cross allegations of his wife and himself about their domestic life—a very difficult investigation even for a regular court of justice. Although no ground of appeal taken before us calls for any pronouncement, it was plain to me that the appellant was obviously quite unqualified to conduct his own rather difficult case before the Watch Committee, and indeed after a very short time abandoned the attempt. I, of course, express no opinion whatsoever on these wider aspects because they were not before us; but it is important to remember that they were not raised, because it serves to demonstrate how narrow and particular were the issues which were raised before Singleton J. and the special jury, and still more so before us.

One defence was put in for all the defendants, the Town Clerk of Liverpool acting for them all. Broadly speaking, the facts constituting the appellant's various causes of action were denied seriatim, and in addition by para. 24 it was pleaded that if the plaintiff (the appellant) was aggrieved by the decision of the Watch Committee, he could have appealed to the Secretary of State under the provisions of the Police (Appeals) Act, 1927, which conferred such a right of appeal, but that he did not do so, that that form of appeal was the only remedy open to an aggrieved policeman, and that having not elected to pursue it, no other course was open to him. The case originally came on in November, 1935, before Hilbery J. and a special jury and lasted some days. At the end of that time an extraordinary incident occurred. The last defendant on the record was a Mrs. Whiteley, a City councillor and magistrate, and a member of the Watch Committee which sat on August 29, 1933. The Town Clerk acted for her in the action equally with the rest of the defendants, and the pleaded defence included her as well as the others. On the sixth day of the trial before Hilbery J. Mrs. Whiteley announced that she agreed with the views of the plaintiff, disagreed with the defence put up for her co-defendants and herself, and asked leave to give evidence, saying that she had not understood what the position was. The learned judge in the circumstances decided to treat the first trial as abortive, and ordered a new trial. He gave Mrs. Whiteley leave, on a summons, to put in a separate defence, but made her pay the costs of the application. Her defence appears in the record. She says (inter alia) that she admits that the hearing before the Watch Committee was conducted contrary to the principles of natural justice—but not by her.

The new trial began at Liverpool before Singleton J. on January 29 and continued to February 5, 1936. Mrs. Whiteley appeared in person (although the learned judge noted in his judgment that she had a solicitor who was advising her in Court), and at the end of the cases of the plaintiff and other defendants she gave evidence. Before us Mrs. Whiteley did not appear as an appellant, but only as a separate respondent, again appearing in person, but on this occasion without the assistance of a solicitor. After Mrs. Whiteley had given her evidence and the jury had answered the long list of agreed questions, Singleton J. delivered a long and careful judgment at the end of which he gave judgment for the defendants with costs, and against the plaintiff on all issues except that of assault, on which he gave him the 5*l.* damages found by the jury, but without costs. He also ordered the defendant Mrs. Whiteley to pay to the other defendants the whole of the costs of the first hearing which had been thrown away. Mrs. Whiteley appeared in person before us, but as a respondent only. It is therefore impossible for us to consider this order for costs against her, even if we were disposed to do so. I am sorry for her—as so often happens when a litigant acts without consulting her own legal adviser; but I do not think the learned judge's order was in any respect unjust.

On the main issues in the case which survived for discussion before us I have come to the conclusion that the learned judge ought to have accepted the contentions on behalf of

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the appellant which I have already summarized, and given judgment for the appellant with suitable declarations of right and an order for payment of the 116*l.* 13*s.* 6*d.* for his rateable deductions from pay. I will deal first with the appellant's contention that his notice of resignation was not, as the respondents contended, defeated by the charges against him, but ran its course, and in fact brought about his statutory resignation on August 24. For the following reasons I think that the appellant's contention is well founded. There is nothing in any Act affecting borough police forces which in express terms provides that a statutory notice of resignation given under s. 10 of the Towns Police Clauses Act, 1847, shall cease to run if the constable who has given notice is charged before expiration of the notice with the commission of an offence for which he is liable to be expelled from the force. It was argued before us that although not expressed such a provision must be implied, because in its absence there might not be sufficient time to take all the proceedings required by the Police Regulations for prosecution of a discipline charge up to and including the final stage of confirmation by the Watch Committee, and that it was impossible that Parliament should have intended such an impasse. But this argument does not carry much weight, for there is a simple answer. In a borough police force the Watch Committee has complete discretion at any moment to suspend a constable; and in that event all his rights as a constable will be suspended—including his right to rely on his current notice of resignation: see per Lord Sterndale M.R. in *Wallwork* v. *Fielding* (1), where he says this: "All these learned judges treat it, it seems to me, as indisputable that if there is a power of suspension which is exercised, the whole contract is suspended, the obligations on both sides are suspended. It seems to me that is the inevitable meaning of suspension, and if there be any power necessary, there was express statutory power here to suspend the man from duty and that involves the suspension of payment for the discharge of the duty. The contract is suspended with regard to its performance by both

(1) [1922] 2 K. B. 66, 72.

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sides, not only by one; therefore, I think that point also fails." And if in an urgent case there is not time to get action taken by the Watch Committee, any two justices have power under sub-s. 4 of s. 191 of the Municipal Corporations Act, 1882, to make an order of suspension. The supposed need for the implication therefore does not exist. But even if the argument of practical inconvenience were not thus disposed of, I could not see my way to imply the provision which the argument demands. In which section of which Act is it to be implied? In s. 10 of the Towns Police Clauses Act, 1847? In what words? Had Parliament intended it in that section, the intention could have been expressed; and if it was not intended there, in what section of what Act should such a provision be implied? It is not consistent with the ordinary rules of statute interpretation to imply such a definite exception or condition in a vague and general way in some unspecified place in a series of statutes extending over a long period of time and covering a wide field of particular topics; it must at least be possible to select a particular provision in a particular Act and say that the exception or condition *must* be read into *that* provision in order to give to the Act the efficacy which its provisions as a whole plainly intend. I cannot see any such exigency here, and I therefore feel bound on this primary ground also to reject the respondents' suggestion. Accordingly, if a constable who has given notice is not suspended before his notice runs out, there is nothing to interrupt its currency. In the present case the appellant was not suspended. His resignation therefore took place on August 24 in accordance with his notice, and he resigned with all his statutory rights. One right was that which he possessed under s. 20 of the Police Pensions Act, 1921, to be paid forthwith the whole of his fund of rateable deductions made under s. 19 of the same Act—namely, the 116*l.* 13*s.* 6*d.* for which he claimed in this action. An ulterior consequence of the resignation was that when the appellant came before the Watch Committee five days later he was no longer a member of the Liverpool City Police Force and the Watch Committee had no power, either executive or judicial, under the Acts and Regulations to dismiss him from the force or to "confirm" the Chief Constable's sentence of dismissal which was by Regulation 20 made expressly subject to subsequent confirmation by the Watch Committee. That this is the meaning of Regulation 20 is clear on its wording; but if there were any doubt, it would be removed by the consideration that in a borough force, as the references I will give in a moment will show, power of dismissal is not given to a Chief Constable, but only to the Watch Committee itself.

That the above reasoning is sound will appear, I think, from an examination of the Police Acts. They have always recognized and maintained certain distinctions between county police forces and borough police forces—and for that matter also between the Metropolitan Police Force and both the former; but we are not concerned in the present appeal with this last distinction. It is convenient in this review of the statutes to deal with the subject of dismissal first, although that topic is more closely germane to the second than the first of the main questions. In county forces the Chief Constable is the chief disciplinary authority for many purposes: see schedule to the Police (Pensions) Act, 1927. By s. 6 of the County Police Act, 1839, he was given an express discretionary power to dismiss, subject to such lawful orders as he might receive from the justices in general or quarter sessions assembled; and that power was extended by s. 15 of the County Police Act, 1840, to the case of county and borough forces consolidated under s. 14 of the latter Act. In counties the ultimate controlling power of the justices continued until the Local Government Act, 1888, came into force. Under s. 9 of that Act the powers and functions of the justices acting as an administrative body were transferred to the Standing Joint Committee of the County Council and the justices constituted under s. 30 of the same Act; and that position still obtains to-day. But in the boroughs a different machinery was set up by the Municipal Corporations Act, 1835, the Watch Committee being by s. 76 constituted the chief authority; and it was provided by s. 77 that the Watch Committee, or two justices, might either "dismiss or suspend any constable whom they shall think negligent in the discharge of his duty, or otherwise unfit for the same." Substantially the same provisions were repeated in ss. 190 and 191 of the Municipal Corporations Act, 1882, which are still in force to-day, with the exception that the power of dismissal was taken from the justices and reposed solely in the Watch Committee. In the schedule of the Police (Pensions) Act, 1927, the Watch Committee is stated to be the chief disciplinary authority in a borough. It is perhaps useful to quote the precise words of s. 191, sub-s. 4, of the Act of 1882: "The Watch Committee, or any two justices having jurisdiction in the Borough, may at any time suspend, and the Watch Committee may at any time dismiss, any Borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same." In a borough it is thus clear that a Chief Constable has no power to dismiss, that power being vested solely in the Watch Committee.

I now deal with the power to suspend. By s. 26 of the County and Borough Police Act, 1859, it was for the first time conferred on the Chief Constable of a county police force, and at the same time conferred on the Watch Committee in respect of a borough police force, but not alternatively on the justices, as had been done by s. 77 of the Municipal Corporations Act, 1835, which I have already quoted. However, whether the power of the justices to suspend was taken away by s. 26 of the Act of 1859 does not matter, for it was given back by s. 191 of the present Municipal Corporations Act above quoted. In a borough the power of suspension is thus to-day exercisable by either the Watch Committee or two justices, but not by the Chief Constable. By s. 4, sub-s. 1, of the Police Act, 1919, the Secretary of State was authorized "to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made." In the case of *Wallwork* v. *Fielding* (1) already cited, it was contended that the above enabling power

(1) [1922] 2 K. B. 66.

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about the "government" of the police and the Regulations made thereunder together had the effect of repealing the power of suspension conferred by sub-s. 4 of s. 191 of the Municipal Corporations Act, 1882; but it was decided by the Court of Appeal that they had no such effect; for neither in the Act nor in the Regulations made under it was there anything said about suspension, or even indirectly affecting it.

The resultant statutory position so far as material to this appeal may be thus summarized: (1.) No one but the Watch Committee could dismiss the appellant; (2.) Either the Watch Committee or two justices could at any moment have suspended him, in which case his right to rely on his notice of resignation would equally have been suspended; (3.) As he was not suspended, all his rights remained intact, and he ceased on August 24 to be a member of the force. In the statement of claim a declaration (A) was prayed "that the Chief Constable was not entitled in law to cancel his acceptance of the plaintiff's resignation," as he did. It is unnecessary to say more on this point, which was not much pressed before us, than that (1.) the notice required no acceptance, and (2.) if it did, there could be no effective acceptance without communication to the author of the notice, which there never was in the present case.

I will now deal with the other main contention of the appellant before us, which was purely alternative—that even if the appellant's resignation did not take place before the hearing of August 29 before the Watch Committee, that hearing and the decision on the issues in the appeal, and the "confirmation" of the punishment, were all invalid and a nullity. Regulation 20 of the Police Regulations purports to do two things: (1.) It repeats in effect the statutory provision that the Watch Committee alone can exercise the executive power of dismissal; (2.) It constitutes the Watch Committee a quasi-judicial tribunal to try the charges against the accused constable. It is both an original hearing in which the Chief Constable is as it were prosecutor, and the accused constable the defendant—rather like an appeal at quarter sessions from magistrates on a question of fact with the onus of proof on the prosecution—and also an appeal by way of rehearing brought by the constable, who is aggrieved by the preliminary decision of the Chief Constable. The first part of Regulation 20 is plainly intra vires s. 4 of the Act of 1919; and it was not contended below or before us that this second legislative provision in Regulation 20 is ultra vires the Act, and I assume that it is intra vires—without expressing any opinion. It is, however, necessary to look at the provision a little closely. Under it the Watch Committee is made a domestic tribunal to try and decide very important issues of fact, of guilt or innocence it may be on grave criminal charges, and anyhow in all cases, where the Chief Constable has proposed dismissal, on charges of great seriousness to the accused constable. On a criminal charge, presumably the Watch Committee would not act, but leave the matter to the ordinary criminal administration of justice; and in any case the decision of the Watch Committee would in my view be no bar to a trial of an issue " between the King and the prisoner " on the same charge in a criminal Court. But as between the constable and the police authority—the Watch Committee itself—which employs him, is the decision of the Watch Committee on a trial under Regulation 20 that the accused is guilty of the offences charged an estoppel against an action for either damages for wrongful dismissal or for declarations that he did not commit the offences charged? That question does not arise here, as the form of the action brought seems to me tacitly to have assumed that the Watch Committee was by the Regulation given exclusive jurisdiction over the question of guilt or innocence of the three charges of offences against the Discipline Code of the Police Regulations. But if this view be right—and I repeat that I express no opinion—it makes the function of the Watch Committee in point of degree approximate to the judicial rather than the quasi-judicial.

In the Report of the Ministers' Powers Committee (Command Paper 4060 of 1932), p. 73 (s. III., para. 3) an attempt was made to define the words " judicial " and " quasi-judicial ": " A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites :—(1.) The presentation (not necessarily orally) of their case by the parties to the dispute ; (2.) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence ; (3.) if the dispute between them is a question of law, the submission of legal argument by the parties ; and (4.) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1.) and (2.), but does not necessarily involve (3.) and never involves (4.). The place of (4.) is in fact taken by administrative action, the character of which is determined by the Minister's free choice." Broadly speaking I think the above definitions there given are correct, but I would make an addition, and that is that on such issues as were tried before the Watch Committee on August 29 the quasi-judicial approaches in point of degree very near to the judicial. This does not of course mean that because the Watch Committee was then exercising nearly judicial functions, it was tied to ordinary judicial procedure. The principles both of its duties and of its freedom are explained in the oft-cited passage in Lord Loreburn's opinion in *Board of Education* v. *Rice* (1), which was quoted by Viscount Haldane L.C. in *Local Government Board* v. *Arlidge* (2), and need not be re-quoted. But whether the Watch Committee's function was judicial or only quasi-judicial makes no difference to the present case, because there are only three criticisms made before us on behalf of the appellant of its conduct of the hearing of August 29, and those are as much applicable to the one function as to the other.

It is plain, beyond doubt, that the Chief Constable was in effect the respondent to Sergeant Cooper's appeal. He

(1) [1911] A. C. 179, 182.

(2) [1915] A. C. 120, 132, 133.

was there in his capacity of Chief Executive Officer of the force, in order to support his own provisional sentence of dismissal. He had prepared the statement of the case on behalf of the force as respondent and against Cooper as appellant, and he read it aloud at the hearing as a sort of opening speech by counsel. From the finding by the jury that it was not read by him to the Watch Committee before Cooper was brought in, I infer that the reading took place at the outset of the trial before anything else took place. The appeal seems to have been treated—rightly—as a re-hearing, and as if the Police Authority were accepting the onus of proof as on the trial of an appeal on fact at quarter sessions, although I am not at all sure that that onus was really taken or discharged; but that issue is not before us and I express no opinion.

Two of the three complaints made before us against the conduct by the Watch Committee of the proceedings before them on the ground that it was contrary to natural justice concern the conduct of the Court in regard to the Chief Constable. The first is that he and his assistant were allowed to sit in a position which gave them the appearance at least of being members of the Court which had to try the accused. They sat next and next but one to the chairman. I think this was wrong. It is contrary to the principle of decisions like *Reg.* v. *London County Council.* (1) In that case the London County Council were determining applications for licences and acting judicially. Three members of a Committee which had refused a licence, their refusal being in effect under appeal before the Main Committee, sat with the others, although they did not vote. Their presence there was held to vitiate the proceedings: see per A. L. Smith J., delivering the considered judgment of the Court (Lord Coleridge C.J. and himself) (2): "In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of Cotton L.J. in *Leeson* v. *General Council of Medical Education* (3):

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(1) [1892] 1 Q. B. 190.
(2) Ibid. 195.
(3) (1889) 43 Ch. D. 366, 379.

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'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.' In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence"; and again (1): "In our judgment, if members of a body such as the London County Council, consisting as it does of 139 persons, and sitting in a building like that at Spring Gardens, desire to retain counsel on their behalf to press accusations against applicants for licences, or others, before the council, they should either absent themselves altogether from the precincts of the building, or sit in such a position, with their counsel, that it may be known to all as to who the real accusers are, and that they do not 'leave the bench' if they remain in the position the three councillors did upon this occasion": see also *Rex* v. *Sussex Justices* (2); and on the importance of the appearance as well as the reality of justice see *Rex* v. *Essex Justices* (3), per Avory J., where he said this: "If we had to consider whether or not he was in fact biassed, that statement would be most material. We have here to determine, however, whether or not there might appear to be a reasonable likelihood of his being biassed. If there might, then justice would not seem to the applicant to be done, and he would have a right to object to the clerk acting as such. I must conclude that, though the clerk to the justices and the justices did not know that his firm had acted for the applicant's wife, the necessary, or at least the reasonable, impression on the mind of the applicant would be that justice was not being done, seeing that the solicitor for his wife was acting with the justices and advising them on the hearing of the summons which she had taken out against him." *Rex* v. *Lancashire Justices* (4) is to the same effect. The case of *Rex* v. *Glamorgan Appeal Tribunal* (5) is distinguishable. It was a time of war, and Court space was scant and pressure great. I read the facts

(1) [1892] 1 Q. B. 198.
(2) [1924] 1 K. B. 256.
(3) [1927] 2 K. B. 475, 488, 489.
(4) (1906) 94 L. T. 481.
(5) (1917) 115 L. T. 930.

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in that case as showing that the Military Representative was in fact segregated some little distance away and treated as if he was in a different room. If the facts cannot be held to justify this view, the decision was wrong. But even if the presence of the respondent sitting to all appearances amongst the members of the Tribunal could be said not to vitiate the proceedings, the fact that he remained with them when the Court was cleared for the Committee to consider its decision, is fatal to the validity of the proceedings. It makes no difference whether he then discussed the case with them or not: the risk that a respondent may influence the Court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all judicial force, and to render it a nullity.

In my view, this action is open to the same objections as the Committee's conduct in allowing the Chief Constable, really the prosecutor on the rehearing and respondent on the appeal, to sit on the Bench with them, but in a more acute degree, as there was from the appellant's point of view secrecy and the risk of bias through the tribunal seeing one party without the other being present. Some relevant aspects of such procedure were discussed by Eve J. in his judgment in *Law* v. *Chartered Institute of Patent Agents* (1), although others did not arise in that case; but I agree with the general views of the learned judge in that case and in particular with this passage (2): "A person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias."

Every one of the Committee by ordering the appellant to withdraw and allowing the Chief Constable to remain closeted with them must inevitably have given rise in the appellant's mind to the suspicion that they already were or might under the influence of the Chief Constable quickly become biassed against him. The rule of justice that a Court must not listen

(1) [1919] 2 Ch. 276.

(2) Ibid. 290.

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to one side behind the back of the other is fundamental—one of those matters of substance, and not mere matters of form to which Lord Halsbury L.C. referred in *Andrews* v. *Mitchell.* (1) It is not necessary to seek further authority for so self-evident a principle of justice as that when a tribunal considers its decision behind closed doors it has no right to invite one party in and shut the other out.

A third ground for impugning the hearing before the Watch Committee on which the appellant relied in the argument before us was that the conduct of the trial was inconsistent with "natural justice" in respect of two incidents. The first was that the chairman, as found by the jury, interrupted the appellant in the course of his evidence and said that he was lying. What provoked the interruption was an answer by the appellant to a question by Mrs. Whiteley. In the learned judge's Notes is this passage, which I quote with an insertion agreed upon between counsel before us, and underlined by me: "Mrs. Whiteley—a member of the committee—said to me 'What do you do with the remainder of your money after you have paid your wife?' I told her that after buying food my wife did not even buy me a bootlace out of it. I bought all my own clothes and for some considerable time I had been assisting my aged parents across the water—they only have old-age pensions. Alderman Burton Eills remarked after nodding his head and commencing to laugh 'He has just thought of that one—we are too old in the head *to believe that, my lad.*' Each time I said anything Chief Constable jumped up and interrupted. *I did not give evidence or make any statement because of the way I was treated. I could see it was useless* because of the attitude of the Chief Constable and the deputy chairman." The incident and an explanatory answer of the jury are dealt with by the learned judge in his judgment, in these terms: "Then this answer is given to this question (8.) 'Did Alderman Eills impute to Cooper that he was lying?'—'Yes.' I thought it right to ask the jury what they meant quite by that. The foreman of the jury said what they meant was that Alderman Burton

(1) [1905] A. C. 78, 81.

Eills made some such remark as 'Oh, he has just thought of that one; we are too old in the head to believe that sort of thing.' That was the only remark to which they pointed, and, so far as I know, it was made on one occasion only. That is on the jury's finding." To meet the first police charge against him this statement, if true, was plainly material, and the tribunal ought to have given him every facility to develop his own evidence about it and to adduce other evidence in support if he had any. I do not doubt that a judge may express his disbelief in a witness altogether, or in respect of a particular piece of evidence; but I do not think the occasion or manner of the chairman's intervention was justified. It tended to shut out a possible defence, and the impression left on my mind is that the disbelief in the honesty of the appellant's evidence was to say the least premature. With the legal result of this view I will deal presently.

The other incident, also found as a fact by the jury, was that the chairman refused to allowed the appellant to call Mrs. Gray as a witness. The appellant in his evidence at the trial before Singleton J. swore that he told the chairman he wanted to call not only Mrs. Gray but also his wife's mother, that the chairman exclaimed "We don't want to hear them. Do you, Mr. Wilson?" and on the latter saying "No" refused the appellant's request. The addition of his mother-in-law was corroborated by Mrs. Whiteley in her evidence. I deal first with Mrs. Gray. In view of the fact that Mrs. Cooper's statement taken by the police in which she accused her husband of immoral relations with Mrs. Gray and Superintendent Rogers' report of August 2 were both before the Watch Committee at the trial, and that Mrs. Cooper was then taken all through her statement by Superintendent Hughes, and, presumably, said that its contents were true, I think the appellant should have been allowed to call Mrs. Gray, even although the Chief Constable said he did not want her evidence. It is true that as the Chief Constable had admitted that she was a wholly respectable woman, the particular allegation of illicit association with her was not being pressed against the appellant, and that allegation had become irrelevant; and if there had been a more regular and thorough hearing, so as to ensure (1.) that the prosecution's complete withdrawal of that allegation was really understood by the members of the tribunal generally, and (2.) that the appellant should have a really sufficient opportunity of making good his contention that at the lowest he was not alone to blame for the unhappiness of his home, that there were two sides to that issue, and, putting it shortly, that he was not guilty on the first and third counts of the indictment against him, I should have agreed with the view that the refusal of leave to call Mrs. Gray did not involve a denial of justice. But I cannot feel sure on that head. I am not satisfied that that was the reality of the position. The fact that the Chief Constable's statement had been read to the tribunal, containing, as it did, a recapitulation of all the findings at which he had arrived, conveying, as it must have conveyed, the inevitable impression of his own strong belief in the truth of his findings; and the further fact that Mrs. Cooper had been taken all through her "statement" with its references to Mrs. Gray, all this must have deeply impressed the minds of the tribunal, even although many of them were magistrates. For these reasons I think the appellant should have been allowed to call Mrs. Gray. Had the lady been called the Chief Constable would no doubt have made a formal disclaimer of any allegation connected with her name; and I think that the appellant was entitled to the benefit of such a definite withdrawal.

In regard to the appellant's complaint in the witness-box that he was refused leave at the hearing before the Watch Committee to call his mother-in-law, the position is different; his statement of claim did not include that point in the particulars of para. 18, and it was not included in the questions left to the jury. I do not think we can consider it now.

Taking both these incidents together I arrive at the conclusion that they are sufficient to show a failure to give the appellant a fair trial. I do not think it necessary in this appeal to discuss the meaning and scope of the expression "natural justice"; it is sufficiently understood to make my judgment clear when I say that the requirements of natural justice were not adequately met. There is a lengthy disquisition upon it in the Ministers' Powers Report, to which I have already referred—pp. 75–80, and without committing myself judicially to everything in that passage, I am in general agreement with it, so far as relevant to this appeal. I conclude therefore that for this reason also the hearing by the Watch Committee was not in the legal sense properly conducted.

The result is that for the three reasons I have given there was, in my opinion, no such hearing by the Watch Committee as is directed by Regulation 20. That Regulation must be construed as meaning that the appeal before the Watch Committee shall be conducted by them in consonance with the essential requirements of justice. However well intentioned the Watch Committee may have been personally in their desire to do their duty, which I do not doubt, the Committee, constituted as a quasi-judicial Court to hear the appeal, failed to conform to those requirements. It follows from this conclusion that there was in law no decision by the Watch Committee, and that the proceedings against the appellant under the Police Regulations were left, so to speak, in the air—charges made but not established ; and thus the further conclusion follows that even assuming, as I have assumed, for the purpose of deciding this, the second main issue, that the appellant's notice of resignation had not already produced his resignation on August 24, there was after August 29 nothing to prevent his notice operating forthwith ; and in my view it did so operate as soon as the Watch Committee treated their supposed but legally inoperative confirmation as the end of the matter.

There is no appeal before us from the learned judge's ruling on the issue of libel that the occasion was privileged, and we have not therefore to consider that matter. On the issues covered by the notice of appeal the result, in my view, is that the appeal must be allowed, the judgment entered for the Watch Committee must be set aside and an amended judgment entered providing for payment to the appellant of the sum of 116*l.* 13*s.* 6*d.*, his accumulated rateable deductions from pay. I think in the circumstances that that judgment ought to include interest on that sum at 4 per cent. from August 24, 1933, the date upon which, in my view, the notice of resignation operated and made his rateable deductions immediately payable.

MACNAGHTEN J. On this appeal from the judgment of Singleton J. it is my misfortune to disagree with the conclusion at which the Lords Justices have arrived. In my opinion the decision of Singleton J. was right: and it therefore becomes necessary for me to state briefly the reasons which compel me, with great respect and most reluctantly, to dissent from the judgment of this Court.

The question at issue on this appeal is whether the dismissal of the appellant, Ernest Cooper, from the police force of the City of Liverpool in August, 1933, was valid. The appellant joined the Liverpool police force as a constable in November, 1919, and was promoted to the rank of sergeant in April, 1930. On July 27, 1933, he gave one month's notice of his intention to resign from the force. This notice would have expired on August 24, 1933, but before that date he was charged under the Statutory Regulations made by the Secretary of State pursuant to s. 4 of the Police Act, 1919, with the three offences against the Police Discipline Code which have already been read in the judgments which have been delivered, and I will not read them again.

On August 14 his case was heard by the Chief Constable, who found him guilty and dismissed him then and there from the force. The appellant thereupon exercised his right of appeal under the Regulations to the Watch Committee. On August 29 the Watch Committee heard the appeal, and confirmed the decision of the Chief Constable. On January 9, 1934, the appellant commenced this action against the Chief Constable and those members of the Watch Committee who were present at the meeting of the Committee on August 29, when the decision of the Chief Constable was confirmed, for a declaration that his dismissal was invalid and that his resignation therefore took effect on August 24, 1933, and that he was entitled under s. 20 of the Police Pensions Act, 1921, to the return of his contributions to the Pension Fund, amounting to 116*l.* 13*s.* 6*d.* In addition to the claim that his dismissal was invalid the appellant also claimed damages for libel against the Chief Constable, damages for assault against Superintendent Hughes and damages for conspiracy against Superintendent Hughes and two other police officers; but all those claims were finally disposed of in the Court below. The appellant recovered 5*l.* by way of damages for assault against Superintendent Hughes, but his claims for libel and conspiracy failed and were dismissed. It is unnecessary to make any further reference to those matters.

The action was tried by Singleton J. and a special jury at the Liverpool Winter Assizes last year. The jury did not return a general verdict; they answered certain questions, which at the request of counsel were submitted to them. The questions and answers which relate to the matters in debate on this appeal were as follows: Did the deputy chairman (*a*) interrupt (*b*) suppress the plaintiff's cross-examination? Answer: No. Did the deputy chairman impute to the plaintiff that he was lying? Answer: Yes. (*a*) Did the plaintiff apply to call Mrs. Gray? Answer: Yes. (*b*) Was such application refused? Answer: Yes. Did the Chief Constable address the Watch Committee in terms of the statement Exhibit 3 in the plaintiff's absence or in his presence? Answer: In his presence. The learned judge held that the dismissal of the appellant was valid, and entered judgment for the respondents. From that judgment the appellant appeals to this Court on the ground, as stated in his notice of appeal, that the learned judge misdirected himself in law in respect of the several matters therein set out. His appeal involves careful consideration of the statutory provisions relating to the borough police forces throughout England and Wales as well as of the facts which were proved or admitted at the trial.

The borough police forces in England and Wales (including the police force of the City of Liverpool) are constituted under

Part IX. of the Municipal Corporations Act, 1882, which provides for the appointment of a Watch Committee and requires the Watch Committee to appoint a sufficient number of fit men to be borough constables. Sect. 191, sub-s. 4, of that Act provides that the Watch Committee "may at any time dismiss any borough constable whom they think negligent in the discharge of his duty or otherwise unfit for the same." It was given in evidence at the trial that the Liverpool City police force is about 2000 strong. A borough constable is entitled to resign his office by giving one month's notice. That, it is conceded, is the effect of the provision contained in s. 10 of the Towns Police Clauses Act, 1847, that "no constable shall resign his office until after he has given to the Superintendent one month's notice." Accordingly, the notice of resignation given by the appellant on July 27 was a valid notice; and, unless he was dismissed from the force before it expired, he would on August 24 have ceased to be a member of the force. The notice of resignation was in the following terms: "I beg to report that I am desirous of resigning from the Liverpool City Police, and tender one month's notice commencing July 27, 1933, and expiring August 24, 1933. My reason for doing this is because I intend going to reside with a relative abroad." On July 31 this notice was submitted to the Chief Constable by Chief Inspector Nichols with the following report: "I beg to submit this application. I have interviewed the Sergeant and he assures me that his wife has full knowledge of the steps he is taking. I intimated I should like to see her, but he prefers that if this course is considered necessary that it should be by the Chief Constable. He appears to be dissatisfied with 'E' Division but affirms that no enquiry or action will prevent him from taking the step intended. He stressed the point that no family difficulty or domestic relations was responsible for his action. He contemplates going to Switzerland." On August 1 the Chief Constable wrote the following minute: "The Sergeant's resignation is accepted. His reasons for resigning are his own and apparently there would not appear to have been any conduct

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on the Sergeant's part calling for disciplinary action. He must, however, clearly understand that an application for reappointment at a later date will not be entertained." Two days later, on August 3, the Chief Constable was informed of the facts which formed the basis of the charges against the appellant and he then wrote the word "cancelled" across the minute.

Before the trial judge and in this Court it was argued that the minute of the Chief Constable "The Sergeant's resignation is accepted" precluded the Chief Constable from dismissing him subsequently. There is in my opinion no ground for that argument. No acceptance of the resignation was necessary and the minute made by the Chief Constable was in fact inoperative, since whether he accepted or refused to accept the resignation, it would have become effective on August 24. But even if acceptance of the resignation had been required to make it effective, it seems obvious that during the currency of the notice the appellant remained a member of the Liverpool police force and subject to the provisions of the Police Discipline Code and to the punishments (including the punishment of dismissal) prescribed by the Statutory Regulations. Before Singleton J. and at the hearing in this Court another point was raised in support of the contention that the notice of resignation given on July 27 became effective on August 24. It was said that, though the Chief Constable purported to dismiss the appellant forthwith on August 14, he had in fact no authority to do so; that the power to dismiss a member of a borough police force belongs to the Watch Committee and to them alone and the Watch Committee did not confirm the decision of the Chief Constable until August 29, five days after the notice of resignation had taken effect. It is true that by s. 191, sub-s. 4, of the Municipal Corporations Act, 1882, the power of dismissal is conferred, not on the Chief Constable, as is the case in the county police forces, but on the Watch Committee. But in my opinion the Regulations made by the Secretary of State under s. 4 of the Police Act, 1919, do confer that power upon the Chief Constable. That section empowers the

Secretary of State " to make regulations as to the government . . . . . of all police forces within England and Wales " and provides that every " police authority shall comply with the regulations so made." The Regulations deal (inter alia) with discipline. They provide for the publication of a " code of offences against discipline " and for the procedure to be adopted where a report or complaint is made suggesting that a member of the force has committed such an offence; and they prescribe the punishments that may be awarded when the commission of an offence is proved. The offences set forth in the code vary from such minor matters as being late on parade or untidy in dress to offences of a serious character, including crimes triable on indictment; and the punishments prescribed by Regulation 21 likewise vary from a mere caution to dismissal. The Regulations provide that when a member of a police force is charged with an offence against the code, the case must be heard by the Chief Officer of Police. Regulation 20 (2.) provides as follows: " In the case of a borough police force, the decision of the Chief Officer of Police shall, subject to any general directions of the Watch Committee be either—(1.) to dismiss the case, or (2.) to remit the case to the Watch Committee for further hearing, or (3.) to award a punishment as provided in Regulation 21. Provided that any punishment other than a caution shall be subject to confirmation by the Watch Committee, and any member of the force who feels aggrieved by a decision of the Chief Officer of Police awarding a punishment shall be entitled to appear before a Watch Committee to appeal against such decision upon giving notice in writing to the Chief Officer of Police forthwith or at any later date not less than three clear days before his case is to be laid before the Committee." The Chief Constable of Liverpool is the Chief Officer of Police within the meaning of these Regulations in that City. Dismissal is one of the punishments prescribed by Regulation 21, and therefore, on the face of it, this Regulation confers upon the Chief Constable power to dismiss. But it is urged on behalf of the appellant that since the Regulation provides that such a punishment is " subject to confirmation by the

Watch Committee," the Chief Constable himself has no power to dismiss. It is to be observed that the Regulation does not provide that the Chief Constable may recommend to the Watch Committee that the offending police officer be dismissed by them; it provides that the Chief Constable himself may "award" the punishment of dismissal though the punishment so "awarded" is subject to the confirmation of the Watch Committee. The use of the word "confirmation" seems to me to import that the punishment to be confirmed must have been previously imposed; and in my opinion the confirmation by the Watch Committee on August 29 of the punishment awarded by the Chief Constable on August 14, namely, that the appellant should be dismissed forthwith from the force, must necessarily relate back to the earlier date.

But then it is said that, if on their true construction the statutory Regulations purport to confer on the Chief Constable this provisional power of dismissal, the Secretary of State had no power under the Police Act, 1919, to make such a Regulation. The statute authorizes the Secretary of State to make Regulations as to the "government" of all police forces in England and Wales, and I should have thought that Regulations as to the government of any disciplined body of men, such as a police force, must needs include provisions with regard to the dismissal of a member of such a body in case of a breach of discipline. If the statutory Regulations had purported to deprive the Watch Committee of the power of dismissal conferred on them by the Municipal Corporations Act, 1882, I could appreciate the argument that this would be beyond the power of the Secretary of State. If the Regulations had conferred on the Chief Constable a power of dismissal such as is entrusted to the Chief Constable of every county police force (and it certainly seems odd that the Chief Constable of a great city like Liverpool, which is a county borough, with 2000 men under his command, should not have the power possessed by the Chief Constable of the smallest county) the argument that such a Regulation was ultra vires might perhaps be maintained. But the Regulations do neither of those things. They do not take away the power of dismissal conferred on the Watch Committee, nor do they confer on the Chief Constable any power to dismiss independently of the Committee. They merely confer on the Chief Constable power to dismiss subject to the confirmation or ratification of the Watch Committee. I apprehend that the Watch Committee themselves, if they had been so minded to do so, could have conferred that limited power on the Chief Constable, and I think that it was lawful for the Secretary of State to do so. With the greatest respect, therefore, I must express my opinion that this contention that the Regulation in question is ultra vires is not well founded. I therefore think that the contention put forward for the appellant that he was not dismissed before August 24, and that his resignation therefore took effect on that date, fails.

I turn now to the additional ground on which the appellant asks for judgment in his favour. By his statement of claim the appellant alleged and by his evidence sought to prove that he did not obtain a fair hearing either before the Chief Constable on August 14 or before the Watch Committee on August 29, that on both occasions the proceedings were conducted with such a disregard of what has been called "natural justice" that the decisions at which they arrived ought to be quashed. So far as the hearing before the Chief Constable is concerned, it is admitted that the verdict of the jury has disposed of the appellant's complaints once and for all, and that the Chief Constable conducted those proceedings properly and fairly and in accordance with the procedure laid down by the Regulations. It only remains, therefore, to consider whether there are any sufficient grounds for setting aside the decision of the Watch Committee. The proceedings before the Watch Committee are impugned on various grounds. Complaint is made of the conduct of the deputy chairman, Mr. Alderman Eills, who presided at the hearing of the appeal, in that he, as the jury have found, by their answer to the eighth question, imputed to the appellant that he was lying, when he stated that he had devoted part of his weekly pay to the support of his aged parents. It is certainly a matter for regret that the deputy chairman should have made such an imputation, more especially in view of the fact that the statement made by the appellant had little or no bearing on the charges preferred against him; but it cannot, I think, be maintained that this conduct on his part affords any sufficient ground for quashing the decision of the Committee. A layman cannot be expected to exercise the wise restraint of an experienced judge; and it is not suggested that the deputy chairman or the members of the Committee were affected by any prejudice or bias against the appellant; on the contrary, it appears that none of them knew anything about the appellant except what they were told in his presence at the hearing of the appeal.

Complaint is also made that the appellant was not allowed to call a Mrs. Gray as a witness on his behalf. The jury have found in answer to the ninth question that he applied to call Mrs. Gray and his application was refused. It seems to be plain, however, from the notes of the evidence, and from the judgment of Singleton J., that Mrs. Gray could not have given any relevant testimony, and no Court is bound to hear irrelevant witnesses. I therefore think that this complaint is baseless. Then it was said that the Watch Committee ought to have given separate hearings for the two questions which were submitted to them—namely, (1.) was the appellant guilty of the offences charged against him, and (2.) if he was guilty, whether dismissal was the proper punishment. In a trial for an indictable offence, where the jury decide the question of guilt, and the judge decides what the sentence of the Court should be, it is of course necessary that the two questions should be separately considered; but where, as in the case of justices in petty sessions or of a Watch Committee hearing an appeal, the same persons have to decide both the question of guilt and the question of punishment, though they must of course decide the question of guilt before considering the question of punishment, there is no need for them after deciding the question of guilt to summon the guilty person before them again for consideration of the question of punishment.

Of all the various grounds put forward on behalf of the appellant for impugning the decision of the Watch Committee, there is but one which, in my view, has substance, and it is this: that after the evidence had been heard, and the appellant and the other parties had withdrawn, the Chief Constable remained in the room with the Committee while they were considering their decision. It is, of course, the duty of a Chief Constable to attend the meetings of the Watch Committee, and at the meetings of the Liverpool Watch Committee the Chief Constable always sits on the left of the chairman. During the hearing of the appellant's case on August 29 the Chief Constable was in his usual place, and it was said by Mr. Wooll for the appellant that the Chief Constable sitting beside the chairman assumed the rôle of prosecutor. But this was not the case. It was Superintendent Hughes who conducted the case against the appellant, and called the several witnesses in support of the charges made against him. All that the Chief Constable did was to read at the commencement of the proceedings a statement of the case which he had prepared for the Watch Committee; and he did this, as the jury have found by their answer to the tenth question, in the presence of the appellant. The statement sets out the facts as found by him at the hearing on August 14, and concludes with the expression of his opinion that the Watch Committee, after hearing the evidence, will arrive at the same conclusion as himself. A statement prepared by a layman is not to be judged by the same standard as that of a trained lawyer; moreover, with but a slight alteration of the wording, the statement of the Chief Constable would be quite unobjectionable. After reading his statement, the Chief Constable took no further part in the proceedings. When the hearing of the case was ended and the parties retired to enable the Committee to consider their decision, the Chief Constable remained in his seat beside the deputy chairman, and I agree with Singleton J. in thinking that it is undesirable that the Chief Constable should remain with the Watch Committee while they are considering their decision on an appeal from him. It is, however, found as a fact that the

Chief Constable, though present in the room, took no part in the discussion. He said nothing at all, and Singleton J., who heard the evidence of all the surviving members of the Committee, was completely satisfied that none of them was in the very smallest degree influenced by the Chief Constable. In these circumstances, though I think it would have been proper for the Chief Constable to withdraw from the room while the Committee were considering whether the appeal from his decision should be allowed or dismissed, I do not think that their decision ought to be set aside merely because he remained in the room. I therefore think that Singleton J. was right in holding that the dismissal of the appellant on August 14 was duly confirmed by the Watch Committee and was in all respects valid.

Two other points which were raised on behalf of the respondents must be noted. By the Police Appeals Act, 1927, it is provided that a member of a police force who is dismissed may appeal to the Secretary of State, and it was submitted that since Parliament has provided this new means of redress, no other remedy is now available. It cannot be doubted that if, before the passing of that Act, a member of a police force had been dismissed in violation of the statutory Regulations, if, for instance, the Watch Committee had refused to hear the accused, and had condemned him unheard, that the High Court of Justice in the exercise of the jurisdiction formerly vested in the Court of King's Bench, would have set aside the dismissal. The Police Appeals Act, 1927, while providing a new remedy, did not purport to deprive the Court of that jurisdiction, and it has not in my opinion done so. The jurisdiction of the High Court over the proceedings of a Watch Committee when they are exercising—as in this case—judicial functions, remains, I think, unimpaired. The second point put forward on behalf of the respondents is that if the Watch Committee so misconducted their proceedings that their resolution confirming the decision of the Chief Constable ought to be quashed, the proper and only remedy is by an application to a Divisional Court of the King's Bench Division for the prerogative writ of certiorari. It is well settled that

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the writ of certiorari runs not only to courts of inferior jurisdiction, but also to all tribunals exercising judicial functions: *Rex* v. *London County Council.* (1) The declaration prayed for in this action is a declaration that the resolution of the Watch Committee confirming the decision of the Chief Constable was invalid and ought therefore to be quashed, and though I fully accept the view that the power of the Court under Order xxv. to make declarations as to the rights of parties is almost unlimited, the limit is in my opinion reached when it is sought to obtain a declaration that a decision of a tribunal exercising judicial or quasi-judicial functions ought to be quashed. It is to be observed that the statement of Lord Sterndale as to the wide power of the Court to make declarations as to the rights of parties in *Hanson* v. *Radcliffe Urban District Council* (2) is restricted to the "rights of parties under contracts." The question at issue in this case was not as to the rights of the appellant under his contract of service but as to the validity of the resolution of the Watch Committee confirming his dismissal from the police force. With very great respect, I venture to think that in such a case an application for a writ of certiorari was the proper and only remedy available to the plaintiff.

Appeal allowed.

Solicitors for appellant: *Teff & Teff, for Alfred Bieber & Bieber, Liverpool.*

Solicitors for respondents: *F. Venn & Co., for Town Clerk, Liverpool.*

(1) [1931] 2 K. B. 215, 233. (2) [1922] 2 Ch. 490, 507.

J. S. H.

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April 28, 29.

PALMER *v.* WATTS, WATTS AND COMPANY, LIMITED.

Workmen's Compensation—Accident—Partial Incapacity—Claim to have it treated as total incapacity—Employment in work on which engaged immediately before accident not available—Employment in previous work as shipwright available but for the accident—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4—*Workmen's Compensation Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 18), *s.* 1.

The Workmen's Compensation Act, 1925, s. 9, sub-s. 4 (as amended by the Workmen's Compensation Act, 1931), provides :—

" If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the County Court Judge either—(i.) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident ; . . . . the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions as may be provided by the order. . . . . " :—

Held, that by the words " work in the same grade in the same class as before the accident " is meant work in the same grade in the same class of employment as the workman was working in immediately before the accident. It is of no avail to show that but for the continuing effects of the injury work in the same grade in the same class of an earlier employment could be obtained.

APPEAL from an award of his Honour Judge Davies sitting at the Haverfordwest County Court as arbitrator under the Workmen's Compensation Act, 1925.

The applicant Leslie Palmer was employed by the respondents in Hook Colliery, near Haverfordwest, as a pumpsman and hitcher, and met with an accident arising out of and in the course of his work on March 16, 1936, as a result of which the index finger of the right hand was crushed and had to be amputated near the base of the finger. His average wages immediately before the accident were *2l.* 14*s.* 5*d.* a week, and he was paid compensation for total incapacity at the rate of 1*l.* 7*s.* 2*d.* a week until May 16, 1936, when he was certified to be fit for light work and the compensation reduced to 9*s.* 7*d.* a week until June 27, 1936, when all payment of compensation ceased.

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On November 13, 1936, the workman brought these proceedings claiming compensation at the full rate of 1*l.* 7*s.* 2*d.* on the ground that he was partially incapacitated, but ought to be treated as totally incapacitated under s. 9, sub-s. 4, of the Act of 1925, as amended by the Workmen's Compensation Act, 1931. The reasons given for the claim to be treated as totally incapacitated were: (1.) That he had failed to obtain suitable light work and but for the effects of the injury would be able to obtain work in the same grade and same class of employment as before the accident; and alternatively (2.) That his failure to obtain employment was a consequence wholly or mainly of his injury.

The workman gave evidence that after obtaining the certificate that he was fit for light work he showed it to the manager of the mine, who said that his hand was too bad for him to be able to do any work he could give him. He had also applied to the Labour Exchange and had been drawing unemployment benefit. He had applied everywhere where he thought he could get a job. Before 1929 he had been apprenticed as and worked as a shipwright at Pembroke Dock. When that work ceased in 1929 he had obtained employment in the Hook Colliery. There was now a shortage of shipwrights, and but for his disability he would have been taken on at Portsmouth Dockyard. Owing to the loss of his finger he could not grip his tools. There was no call for shipwrights before last March. Hook Colliery was now closed down altogether.

Mr. R. L. Hancock, shipbuilder at Pembroke Dock and Milford Haven, said that the applicant had served his apprenticeship as a shipwright with his firm. He became very efficient and went to the dockyard afterwards. It closed down in 1929. He had seen the applicant's hand. As a shipwright the applicant was finished. But for this he would have employed him when he applied for work during the preceding six months.

For the respondents Dr. H. O. Willis said the workman was suffering no pain except where the scar was. There were no adhesions. He had quite a useful hand. He could do the work of pumpsman and hitcher. Cross-examined, he said he

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was not sure that the plaintiff could do shipwright's work. When the grip was exercised pain would result.

The manager of the colliery said that after the workman's accident some other man was given his work. The pit closed down soon afterwards. The workman came to him for light work, but he said he had none available.

The county court judge said he was satisfied that the workman was partially incapacitated. The Hook Colliery was closed, and many of his fellow workmen at the colliery were still unemployed. The workman did not relax his efforts to obtain work which he was capable of doing after he could obtain no light work at the colliery. In his evidence he mentioned the persons to whom he had applied and had refreshed his memory from letters received from them in reply to his applications. He (his Honour) was satisfied that the workman took every reasonable step open to him to get employment. He was satisfied also that but for the continuing injury he would probably have obtained work as a shipwright. He was not satisfied that even if he was uninjured he could obtain employment as a pumpsman and hitcher.

In the circumstances the workman claimed that his incapacity should be treated as total within s. 9, sub-s. 4, of the Act. The respondents contended that he could not succeed in this claim because his grade and class of employment before the accident was that of a pumpsman and hitcher, work that he could not obtain apart from the accident.

The words of the sub-section are work " in the same grade in the same class as before the accident " and the word " immediately " did not occur in front of " before the accident." Again, the time was not limited, as in s. 9, sub-s. 2, to twelve months prior to the accident or, as in s. 8, to three years next preceding the injury. In his opinion the omission of any limitation was deliberate. A versatile workman might claim to belong to more than one grade or class, and inasmuch as earning capacity meant capacity to get as well as to do work, a man who was a bricklayer as well as a carpenter had a higher earning capacity than a man who was only a carpenter or only a bricklayer. The object of

s. 9, sub-s. 4, of the Act was in his view to allow the versatile workman to benefit by his versatility and to rely upon the probability of his employment in grade B even if the work of grade A in which he was employed at the time of the accident was closed against him independently of any disability.

The applicant was a skilled shipwright, and would have been able to obtain work in this capacity but for the injury to his hand. Interpreting s. 9, sub-s. 4, he thought that before the accident his grade and class of work was that of a shipwright and (temporarily) that of a pumpsman and hitcher.

For these reasons he would hold that the applicant's incapacity was total from January 25, 1937. The employers had paid compensation on the footing of total incapacity from December 16, 1936, to January 25, 1937, in order to obtain an adjournment. For the period from June 27, 1936, to December 16, 1936, compensation must be awarded on the footing of partial incapacity at the rate of 9*s.* 7*d.* a week.

The employers appealed. The appeal was heard on April 28 and 29, 1937.

Herrick Collins for the appellants. The partial incapacity of the workman is not denied, and the appeal is against the order of the county court judge that the incapacity of the workman should be treated as total under the Workmen's Compensation Act, 1925, s. 9, sub-s. 4, as amended by the Workmen's Compensation Act, 1931. He has so held under the first paragraph of sub-s. 4, and for the purpose has found that " it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident." He so found not on the ground that he could have obtained employment as a pumpsman and hitcher, which was his work for seven years before the accident, but that he could have obtained employment in his previous work of a shipwright. On the true construction of the sub-section his employment as a shipwright is not employment in the

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same class as before the accident. The man's versatility, on which the county court judge relies, and his capacity and ability as a shipwright are not the test. What is contemplated by sub-s. 4, para. 1, is the grade and class of employment before the accident. The other paragraph of sub-s. 4 contemplates the case where the man can find no employment of any kind; but the first paragraph has regard only to the case where the man is prevented by his injury from resuming the employment he was at before the accident. It would be an injustice if the employer immediately before the accident was made liable to pay compensation for total incapacity by reference to the man's ability to obtain work of the kind he was engaged upon before he was taken by the employer into his employment. "Before the accident" means next or immediately before the accident.

[He was stopped.]

Trevor Morgan K.C. and *Jenkin Jones* for the respondent. The county court judge had to decide what was the workman's employment before the accident, and he found that his true employment was that of a shipwright and that he had merely taken on the work of pumpsman and hitcher because of the slump in 1929 in the shipbuilding trade. He took it to be temporary work and that throughout his real job was that of a shipwright, work which he would have resumed now that there was a demand for shipwrights but for the continuing effect of the accident. The county court judge has really followed a statement by Lord Atkin in his speech in *Robert Addie & Sons Collieries, Ld.* v. *McCracken.* (1)

[SCOTT L.J. In that case there was only one employment.]

There is nothing in the section to justify reading "before the accident" as meaning "immediately before the accident."

[ROMER L.J. It is plain that the compensation depends on the earnings immediately before the accident, and it is only when the man can say that but for his accident he would be earning his pre-accident wage that it would be just to measure the compensation by reference to the pre-accident wage.]

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(1) (1936) 29 B. W. C. C. 378.

There are no limiting words as there are in other sections, where reference is made to earnings in the last twelve months or the last three years. This is not a case where a man of his own volition abandoned one class of employment and took on another.

Even, however, if the workman is not entitled to compensation on the footing of total incapacity under para. 1 of sub-s. 4, he is so entitled under para. 2. It is true that the county court judge based his award on para. 1, but there was evidence entitling him to make the same award under para. 2.

[ROMER L.J. This question will have to be referred back to the county court judge to find the necessary facts.]

The judge has found that the man took every reasonable step to try and get work, and if the Court is satisfied that there was evidence on which he could so find, it will be unnecessary to send the case back to the county court.

Herrick Collins in reply. As the evidence stands there is nothing to justify the Court in holding that the failure to get work is the result of the injury.

SIR WILFRID GREENE M.R. This appeal relates to the case of an accident which took place on March 16, 1936, to the respondent at a time when he was employed as a pumpsman and hitcher at the appellants' colliery. He had been employed in that capacity at that colliery for seven years; but previously to the commencement of that employment he had been employed for several years as a shipwright, which was the trade to which he was originally apprenticed. In the year 1929, owing to the depression in the shipbuilding industry, he left the shipyard and obtained employment in the capacity which I have mentioned at the appellants' mine. The accident was an accident to his index finger of the right hand, and as a result of it the finger had to be amputated. The result of that is that he is not fit to carry on work as a shipwright. He obtained an award in the first place on the basis of total incapacity, but the payment under that award was terminated on June 27, 1936, and he thereupon applied for arbitration on the question whether he was entitled to compensation on the basis of total incapacity under s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, as amended by the Act of 1931.

The case that was set up on behalf of the workman fell under both of the paragraphs of that sub-section as amended; but the learned county court judge came to a conclusion in his favour on the first paragraph, and the first paragraph alone, and on the second paragraph his judgment is silent. I shall deal first of all with the case as made out under the first paragraph. That sub-section, apart from para. 2, reads as follows: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the County Court Judge . . . . that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident; . . . . the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions as may be provided by the order. . . . ."

The learned county court judge has found in the present case that the workman would not be able to obtain work as a pumpsman and hitcher, the reason for that being that the mine has been closed down and that there is no employment available in that capacity; but he has given the workman the benefit of that branch of the sub-section by finding that he would have been able to obtain work as a shipwright but for the injury, and that work as a shipwright would be work in the same grade and in the same class of employment as before the accident.

It is to be observed that at the time of the accident the man had not been working as a shipwright for the seven years immediately preceding the accident; and it is said that the effect of the provision is that a man who has changed his employment one or more times before entering into the employment in which he was engaged at the time of the accident has, for the purposes of the sub-section, a right to choose the class of employment to which he will ascribe himself. The learned county court judge has approached the matter as though the problem which the section set for his decision was: What is the class of workman, what is the grade of workman, that the man is in? The section says nothing about that; the section is considering the work and not the workman. The argument, as I have said, comes to this: Taking the relevant words of the sub-section, "work in the same grade in the same class of employment as before the accident," it is said that the learned county court judge is entitled to examine all the work which the man has ever done in the course of his employed life and see whether but for the accident he would be able to obtain work in any of those kinds of employment, and, if he would, no matter how long it be since he left that kind of work, no matter how many times he has changed his employment, nevertheless the result would be that that employment could be properly described as the same class of employment as before the accident.

It is impossible, to my mind, to see any reason in justice or logic why the Legislature should have made any such provision at all. But, what is more important, I can find nothing in the language of the sub-section to justify such a construction. It appears to me that when the sub-section is read in its normal and clear meaning as a piece of not very accurate English, its meaning is that you must look at the employment in which the man was before the accident and discover whether work in that employment is work in the same class of employment as the work which the man now says he would be able to obtain but for the accident. That does not justify an inquiry into work in which the man was engaged at some period before the accident but which had ceased to be his work at the time of the accident.

We are not without some assistance from authority, because in the case of *Robert Addie & Sons Collieries, Ld.* v. *McCracken* (1) Lord Atkin explains the object of this limb of the sub-section, and he says (2): "I think that provision

(1) 29 B. W. C. C. 378. (2) Ibid. 380.

plainly means that if a workman has been injured so that he is unfit to get his former employment but is fit for light work—in the words of the sub-section 'has so far recovered from the injury as to be fit for employment of a certain kind'—and if he has taken all reasonable steps to get light work and has failed to get it, possibly because of the condition of the market, but can show that notwithstanding any economic conditions generally prevailing in the labour market, yet in his own job there would have been room for him but for the accident, he is entitled to say: 'I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages.'"

It is perfectly true that Lord Atkin, when he used those words, had not got before him the particular point which is raised before us; but the analysis which he gives of the meaning of the sub-section appears to me to lead to the conclusion which he has expressed in the words which I have last quoted and to demand that the matter which has to be looked at is the pre-accident work. As a matter of English, in a context of this kind "pre-accident work" cannot mean work at some period in the man's life which historically preceded the accident. "Pre-accident work," when dealing with accidents under an Act of this kind, must mean in its ordinary sense work which the man was in at the time of the accident, and in my opinion that is what is meant in this limb of the sub-section.

It is worth noticing the very curious results to which the opposite conclusion would lead. In the first place, it would lead to historical inquiries as to the man's industrial history, going back possibly for a number of years through a number of changes of employment. Mr. Trevor Morgan, when pressed, was constrained to admit that in that examination of that historical matter it would be relevant and essential to inquire what was the man's intention at the time he changed his employment, which might have taken place many times, because Mr. Trevor Morgan quite rightly conceded that if it was the man's intention on a change of employment to leave that employment for good, then it could not be said that that employment was the same class of employment within the meaning of the sub-section. Therefore, it would be necessary to inquire not only into matters of historical fact but into the intention in the man's mind at the time he made the changes.

One further aspect of the matter is, that the wages which the man was obtaining in the employment on which he was engaged as a shipwright have nothing to do with the measure of compensation which he claims. The measure of compensation which he would receive on the basis of total disability would be based on his wages for the past twelve months. He was not employed as a shipwright during the past twelve months; and the remarkable result would ensue that, for the purpose of ascertaining whether work could be obtained in the same class, regard could be had to a trade, in which the wages were different, and yet, when the measure of his compensation came to be ascertained, it would not be by reference to the wages which he would have earned in that trade at all. That seems to me to be quite inconsistent with the passage I have just read from Lord Atkin's speech: "I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages." If the pre-accident employment was the employment of a shipwright, as the respondent argues in this case and as the learned county court judge has found, it would not be compensation based on the wages of that employment that the man would get, it would be compensation based on the wages of a different employment—namely, that of a pumpsman and hitcher. In my opinion there is no justification in the language used for the construction which the learned county court judge has placed upon it, and his judgment in that respect was wrong.

I come to the second limb of the sub-section, under which the workman, if he can show that his failure to obtain employment is a consequence, wholly or mainly, of the injury, is entitled to have his incapacity treated as total. The position with regard to that is a little difficult. The workman originally based his case on both limbs of the sub-section, and he never abandoned either limb. The learned county court judge has based his judgment entirely on the first limb, and we have no finding of fact by him one way or the other as to the second limb. Under that limb, of course, the workman is bound to show, not merely that he has failed to obtain employment—and, be it observed, that is not confined to employment in the particular class in which he was employed before, but means any employment—but also that the failure is a consequence, wholly or mainly, of the injury. The learned county court judge had that issue before him, but, taking the view, as he did, that the matter fell within the first limb of the sub-section, he did not, in his judgment, direct his mind to the second limb. Indeed, in the course of the case, taking the view that the workman was likely to succeed on the first limb, he in effect invited counsel for the workman to concentrate on that matter. As a result, he did not have the advantage of having the case fully placed before him with regard to the second limb.

Mr. Collins says, and says with force, that the employer ought not to suffer from that, and he then says that if the evidence be examined it will be found that there is no evidence on which the learned county court judge could have found that the failure was a consequence, wholly or mainly, of the injury. The learned county court judge has found quite clearly, and in terms very creditable to the workman, that he has made every effort to obtain employment, that he is anxious to get employment but has failed to get it. It is true that the evidence as recorded does not state what the cause of that failure is, and the recorded evidence is consistent with one view or the other. That there was evidence before the learned county court judge relating to the failure which is not recorded in the note is clear when one reads his judgment; but what exactly that was or what it amounts to is a matter on which we are unable to speculate. The matter is essentially one for the learned county court judge's finding of fact, and, in the circumstances, I am of opinion that it would be highly

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unfair to the workman not to give him the opportunity of having that case fully presented before the learned county court judge.

The effect will be that the appeal must be allowed, because the judgment cannot stand; but the question arising under the second limb of the sub-section must go back to the learned county court judge. With regard to costs, the appeal having succeeded, the appellants must have the costs of this appeal. With regard to the costs of the first hearing, the costs of that will be in the discretion of the learned county court judge when he comes to decide the matter which is referred back to him. In the event of the workman not proceeding with that application and the matter not coming, therefore, before the learned county court judge, the present appellants must have the costs of the first hearing.

ROMER L.J. I agree. On the second point with which the Master of the Rolls has dealt I do not wish to add anything; but on the first point, which is a point of considerable importance, arising under sub-s. 4 of s. 9 of the Workmen's Compensation Act, 1925, as amended by the Act of 1931, I should like to add a few words, more especially as we are differing from the decision of the learned judge in the court below. For the purpose of construing that sub-section, I think it is essential to bear in mind the reason why it was enacted. When a workman is totally incapacitated by injury by accident arising out of and in the course of his employment, the compensation payable to him by his employer is calculated by reference to his pre-accident wages, that is to say—I am now reading from s. 9, sub-s. 2—" The workman's average weekly earnings during the previous twelve months, if he has been so long employed by the same employer; but if not, then for any less period during which he has been in the employment of the same employer." In other words, the compensation in the case of total incapacity is to be calculated not by reference to his wage-earning capacity in general but by reference to the wages that he was in fact earning during the twelve months preceding the accident. In the case of

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partial incapacity—that is to say, in cases where the workman, although incapacitated to the extent that he cannot carry on his former work, is nevertheless able to earn a wage in some other suitable employment—the compensation payable by the employer is no longer based entirely upon the pre-accident wages, but it is based on the difference between the pre-accident wages and what the workman is able to earn in some other suitable employment.

Sub-s. 4 is addressed to the cases in which it is considered just that notwithstanding that the workman is only partially incapacitated, his compensation should be calculated by reference to his pre-accident wages alone. Para. (ii.) of sub-s. 4 deals with the case where the workman, having taken all reasonable steps to obtain such other employment, has failed to do so wholly or mainly because of his injury. It is not sufficient for the workman to show that he has failed to obtain that other employment because of the state of the labour market; he must show that his failure is due wholly or mainly to the accident. Those are the cases dealt with under para. (ii.), and where the workman can show that his failure to obtain this other employment is due wholly or mainly to the injury, the county court judge can award him compensation calculated on the basis of this pre-accident wage.

There is also para. (i.) of sub-s. 4 to be considered. The reason for the introduction of para. (i.) into the section has been explained by Lord Atkin in the case to which the Master of the Rolls has already referred, *Robert Addie & Sons, Collieries, Ld.* v. *McCracken* (1), where Lord Atkin said (2): " It was intended to meet the case, which was a case of hardship that had often been discussed in the Courts, of a man who has lost his own special employment because of his injuries, and, though he was fit for light work, had been unable to obtain light work, sometimes because of the economic condition of the market, owing to which a man who was fit only for light work could get no employment at all "—that, of course, would be a case in which the workman could not take advantage of para. (ii.). Then Lord Atkin goes on:

(1) 29 B. W. C. C. 378. (2) Ibid. 380.

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"That is why para. (i.) of this sub-section has been put in. With great respect to counsel for the appellants, who put his argument very plainly, I think that provision plainly means that if a workman has been injured so that he is unfit to get his former employment but is fit for light work—in the words of the sub-section, 'has so far recovered from the injury as to be fit for employment of a certain kind'—and if he has taken all reasonable steps to get light work and has failed to get it, possibly because of the condition of the market, but can show that notwithstanding any economic conditions generally prevailing in the labour market, yet in his own job there would have been room for him but for the accident, he is entitled to say: 'I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages.'" In other words, the sub-section is introduced to meet the case of a workman who can adduce as a reason for being compensated on the footing of his pre-accident wages the fact that but for the accident he would now be earning those pre-accident wages. That reasoning does not apply at all to a workman who cannot show that but for the accident he would be earning his pre-accident wages, but that, but for the accident, he would be earning some wages which he was earning fifteen years before the accident.

I come, therefore, to the same conclusion as that arrived at by the Master of the Rolls, that para. (i.) of sub-s. 4 is not dealing with any employment other than the employment in which the man was engaged by his employers just before the accident. I think, further, that that conclusion could be arrived at by having regard to the language of the paragraph, without considering at all the reasons why the paragraph was inserted. It is to be observed that what has to be considered by the county court judge or the arbitrator is: "The same class of employment as before the accident"—not "Any class of employment in which he was at any time engaged before the accident." It must be the same grade, the same class, as the grade and the class of employment that he was engaged in before the accident. That being so, the one class

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of employment that has to be considered is obviously the class of employment in which the man was engaged immediately before the accident. I agree with the order that has been proposed by the Master of the Rolls.

SCOTT L.J. I agree, and I have nothing to add.

Appeal allowed.
Leave to appeal to the House of Lords was refused.

Solicitors: *Barlow, Lyde & Gilbert, for F. E. Metcalfe, Bristol; John T. Lewis & Woods, for Randell, Saunders & Randell, Llanelly and Swansea.*

H. C. G.

THE KING *v.* RULE.

C. C. A.

1937

April 27 ;
May 7.

Criminal Law—Defamatory libel—Privileged occasion—Communication by constituent to Member of Parliament—Common interest.

The appellant wrote to the Member of Parliament for his constituency two letters containing defamatory statements about a police officer and a justice of the peace for the place where he resided. He was charged with publishing defamatory libels and pleaded that the libels were published on a privileged occasion. The trial judge ruled that the occasion was not privileged and the appellant was convicted :—

Held, by the Court of Criminal Appeal, that a Member to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such a publication a privileged occasion, and that in the absence of evidence of malice on the part of the appellant the conviction could not stand. ✓

APPEAL against conviction.

The following statement of facts is taken from the judgment of the Court :—

" The appellant, Harry Rule, was convicted before Branson J. at the Assizes for the County of Southampton upon an indictment which charged him with publishing defamatory libels, knowing them to be false. There were two counts in the indictment. The first related to a libel concerning a detective-sergeant in the Southampton police force published in letters addressed to Mr. William Craven-Ellis, the second to a libel, published in one of those letters, concerning a justice of the peace for Southampton. There was no plea of justification. At the close of the case for the prosecution the counsel for the Crown said that he would not ask the jury to find that the appellant knew the alleged libels to be false, and submitted that on the evidence the appellant should be convicted of publishing defamatory libels. Counsel for the appellant then submitted that the letters were written on a privileged occasion, so that the appellant was entitled to be acquitted unless the jury found that in writing them he was actuated by malice. After hearing argument, the judge ruled that the occasion was not privileged. Thereupon counsel for the appellant announced that he would call no evidence and would not address the jury, inasmuch as all the evidence he had proposed to call was directed to show that the defendant had acted bona fide and without malice. The judge directed the jury that they should convict the appellant if they were satisfied that he published the libels and that the words complained of were defamatory. The jury found the appellant guilty on both counts. The judge ordered that he should be bound over in his own recognizances in the sum of 50*l.* for twelve months to be of good behaviour and to come up for judgment if called upon, and that he should pay the costs of the prosecution.

The question for our determination is whether the judge was right in holding upon the evidence before him that the occasion was not privileged. If that decision was correct, the verdict cannot be challenged ; if it was erroneous, it follows that the conviction must be quashed.

The relevant facts are as follows : Mr. Craven-Ellis is one of the Members of Parliament for Southampton. The appellant is an inhabitant and an elector of that county borough. Early in July, 1936, the appellant had been in communication with Mr. Craven-Ellis, with the object of inducing him to help the appellant to bring certain matters, at first unspecified, to the attention of one of His Majesty's Ministers. On July 7 the appellant wrote to Mr. Craven-Ellis a letter in which he said : ' My business with either the Home Secretary or the Minister of Health is of the utmost urgency and importance which vitally affects two of your constituents' happiness.' In the same letter the appellant offered to produce documents in his possession to Mr. Craven-Ellis.

On the same date Mr. Craven-Ellis acknowledged and replied to the appellant's letter. The terms of his reply are of importance. ' Whilst I am most anxious,' he wrote, ' to do whatever I can to help my constituents who are in difficulties, it is quite impossible for me to ask the Secretary of State for Home Affairs to give an appointment unless I have first intimated to him what the purpose of the appointment is. You say that you are in possession of certain documents. These can be forwarded to me with utmost confidence, and if a full statement of the case accompanies the documents I can take steps to meet your wishes. . . . . If you can let me have the statement and the documents by Thursday morning, it would then be possible to fix an appointment with the Minister early next week.'

It was in response to this letter that the appellant, on July 8, wrote the two letters which are the subject of these proceedings. With one of them he enclosed a long statement signed by two persons which contained allegations of grave and indeed criminal misconduct against a detective-sergeant of police of the Southampton police force. The appellant took it upon himself to affirm his belief in these allegations, and further, in a postscript to a second letter of July 8, alleged that a gentleman, whom he named and described as 'Chairman of the Harbour Board,' and who is also a justice of the peace, had been guilty of theft and other dishonest practices. 'I can produce several living persons,' he added, 'as well as myself who can prove these awful statements to be absolute facts.'"

J. Scott Henderson for the appellant. A constituent who writes to his Member of Parliament writes on a privileged occasion. A Member of Parliament has an interest in receiving the grievances of his constituents and bringing them before the House. From the general constitutional point of view, the subject has always had the right of approach to Parliament and the Crown. See May's Parliamentary Practice, 13th ed., pp. 608, 614; *Lake* v. *King* (1); *Fairman* v. *Ives* (2); *Ashby* v. *White* (3); *Dickson* v. *Wilton (Earl)* (4); *Wason* v. *Walter*. (5) But a person desiring to petition Parliament must approach it through an individual Member, and there is sufficient common interest or duty in a Member dealing with a communication from a constituent to render the occasion privileged. [He referred to *Harrison* v. *Bush* (1); *Davies* v. *Snead* (2); *Jenoure* v. *Delmege.* (3)] It must be conceded that if this communication had gone straight to the Home Secretary it would have been privileged. It is to be remembered that in this case the communication was sent in answer to an invitation from the Member, who had interested himself in bringing his constituent into touch with the Minister. Even if the writer made an honest mistake in going to the wrong person that does not lose the privilege: see *London Association for the Protection of Trade* v. *Greenlands, Ld.* (4)

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(1) (1670) 1 Wms. Saunders, 137.
(2) (1822) 5 B. & Ald. 642.
(3) (1704) 14 St. Trials, 695.
(4) (1859) 1 F. & F. 419.
(5) (1868) L. R. 4 Q. B. 73.

F. J. Tucker K.C. and *W. Blake Odgers* for the Crown. If the test is what can the Member of Parliament do with the information, as a Member, when he gets it, it opens the door very wide. If a complaint could be made to any Member of Parliament, the careful consideration in *Hebditch* v. *MacIlwaine* (5) of the question to whom the complaint should be made would never have arisen. *Chaffers* v. *Goldsmid* (6) only tends to emphasize that a Member of Parliament once elected represents the realm as a whole. The mere relationship of constituent and representative would not ordinarily create a common interest, but there might be circumstances when it would. The fact that the Member made a request throws no light on the matter. The test must be, was the duty or interest there at first. For the duties of Members of Parliament see Blackstone's Commentaries, Bk. 1, c. 2. [They referred to *Graham* v. *Crozier.* (7)]

[THE LORD CHIEF JUSTICE. From the use of the expressions "privileged document" and "privileged communication" in that case it looks as though absolute privilege had been claimed.]

Blagg v. *Sturt* (8) was considered in *Harrison* v. *Bush.* (9)

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(1) (1855) 5 E. & B. 344.
(2) (1870) L. R. 5 Q. B. 608.
(3) [1891] A. C. 73.
(4) [1916] 2 A. C. 15, 22.
(5) [1894] 2 Q. B. 54.
(6) [1894] 1 Q. B. 186.
(7) (1879) 44 Upper Canada Rep. (Q. B.) 378.
(8) (1846) 10 Q. B. 899.
(9) 5 E. & B. 344, 354.

In *Hebditch* v. *MacIlwaine* (1) the persons to whom the communication was made had no interest. The mere fact that it is usual to make a complaint in a certain quarter is not enough if in fact it is the wrong quarter: see *Harwood* v. *Green*. (2) If a constituent chooses to approach his Member of Parliament because he is thought to have the ear of the Home Secretary he does so at his own risk.

Henderson in reply. It makes no difference that the matter has already reached the stage of debate in Parliament, as in *Dickson* v. *Wilton* (*Earl*) (3), for the Member, on receipt of the information, could raise the matter in debate, with or without notice to the Minister that he was going to do so, and his interest would be the same in either case.

Cur. adv. vult.

1937. May 7. The judgment of the Court (LORD HEWART C.J., HUMPHREYS and DU PARCQ JJ.) was read by LORD HEWART C.J., who, after the statement of facts above set out, continued: In the absence of any finding that the appellant was actuated by malice we are bound to assume for the purposes of our judgment that, although these libels were wholly untrue, the appellant honestly believed them to be true and, in publishing them, was not influenced by any wrong or indirect motive. On this assumption, he was entitled to be acquitted if the communication which he made to Mr. Craven-Ellis fell within the legal canon adopted by the Court of Queen's Bench in *Harrison* v. *Bush* (4): "A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

It was conceded in argument that the appellant had an interest in the subject-matter of the libels. Indeed the contrary could not well have been contended. In the circumstances of this case, as in those considered in *Harrison* v. *Bush* (1), every elector and inhabitant of the locality would have an interest in the conduct of its public functionaries. (See per Lord Campbell C.J.) The question remains whether Mr. Craven-Ellis had a corresponding interest, and it was to this point that the argument before us was mainly directed. It was not disputed that the Secretary of State for Home Affairs was the Minister, or one of the Ministers, to whose attention it was proper to bring these complaints in the public interest.

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(1) [1894] 2 Q. B. 54.
(2) (1827) 3 C. & P. 141.
(3) 1 F. & F. 419.
(4) 5 E. & B. 344, 348.

The discussion has covered a wide field, but it will not be necessary for this Court to express any opinion as to the rights and duties generally of Members of Parliament. It is sufficient for the purpose of this case to say that in our judgment a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion. When once it is seen that a decision favourable to the appellant requires no more than this limited assertion of the interest of a Member of Parliament in the welfare of his constituents, it appears to us impossible to resist the conclusion that the conviction cannot be supported.

In so holding we are doing no more than give effect to well settled principles. In the case of *Hebditch* v. *MacIlwaine* (2), upon which reliance was placed by counsel for the Crown, it was not in dispute that the persons (a board of guardians) to whom the libel was published had no interest in the matter. (See per A. L. Smith L.J., at p. 62.) The meaning of the word "interest" in this context is stated in a passage in the late Fraser J.'s book on the Law of Libel and Slander, where the learned author summarizes the effect of many decisions: "This common interest may be in respect of very

(1) 5 E. & B. 344, 348, 349.

(2) [1894] 2 Q. B. 54, 62.

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varied and different matters; indeed, the only limitation appears to be that it should be something legitimate and proper, something which the Courts will take cognizance of, and not merely an interest which is due to idle curiosity or a desire for gossip." (See Fraser's Law of Libel and Slander, 7th ed., at p. 152; in the 5th ed., at p. 229.)

It is in our view impossible to contend that the Member of Parliament had not at least such an interest in the subject-matter of the libels as would come within this limitation.

It follows in our judgment that the appeal must be allowed and the conviction quashed. The orders of the learned judge consequent upon the conviction will be set aside.

Solicitors for appellant: *Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for the Crown: *Sharpe, Pritchard & Co., for R. R. H. Meggeson, Town Clerk, Southampton.*

J. W. H.

1937
April 14, 15.

LANGLEY CARTAGE COMPANY, LIMITED *v.* JENKS.

ADAMS *v.* SAME.

Road traffic—Traffic sign—Portable board bearing words " Stop, Road Traffic Officer, Bucks C. C."—Device for stopping vehicles required to be weighed—Sign for regulating the movement of traffic—Authorization of the Minister of Transport—Validity—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 48, *sub-ss.* 1, 9; *s.* 49—*Road Traffic Act*, 1934 (24 & 25 *Geo.* 5, *c.* 50), *Sch.* 3.

By an information preferred by an inspector of weights and measures of the Buckingham County Council—a person duly authorized to weigh motor vehicles for the purposes of s. 27 of the Road Traffic Act, 1930—a cartage company was charged with " unlawfully aiding, abetting, counselling and procuring " a driver of one of its motor vehicles " to fail to conform to the indication given by a traffic sign . . . . for regulating the movement of traffic " authorized by the Minister of Transport, pursuant to s. 48 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934. By a second information the driver was charged with failing to conform to the indication given by the said sign.

The sign consisted of a portable revolving board, bearing on one side the words " Stop, Road Traffic Officer, Bucks C. C.," and, as found by the justices, conformed in all material respects to the authorization and directions of the Minister of Transport.

On appeals by the defendants from the decisions of the justices it was contended that the device in question was not a traffic sign within the meaning of ss. 48 and 49 of the Act of 1930 (1); that the purported authorization of the said device by the Minister was ultra vires; and that the road traffic officer had no authority or right in law to stop a motor vehicle travelling on the road:—

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(1) Road Traffic Act, 1930, s. 48, sub-s. 1: " Subject to and in conformity with such general or other directions as may be given by the Minister a highway authority may cause or permit traffic signs to be placed on or near any road in their area."

Sub-s. 9: " In this Part of this Act, the expression ' traffic sign,' includes all signals, warning sign posts, direction posts, signs, or other devices for the guidance or direction of persons using roads; . . . ."

Sect. 49: " Where a police constable is for the time being engaged in the regulation of traffic in a road, or where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road in accordance with the provisions of the last preceding section, any person driving or propelling any vehicle who . . . . (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence."

Held, that the said device was a sign for regulating the movement of traffic within the meaning of ss. 48 and 49 of the Act of 1930; that the stopping of a vehicle was the regulating of its movements within the meaning of those sections; and that the authorization by the Minister was therefore intra vires his powers, and the appeals must be dismissed.

APPEALS by way of Cases stated by the justices of the peace for the county of Buckingham, sitting at Amersham.

At a court of summary jurisdiction sitting at Amersham an information was preferred by the respondent, Thomas Harold Jenks, against Langley Cartage Co., Ld., for that they did unlawfully on July 10, 1936, aid, abet, counsel and procure George Adams, a person in their employ, who was driving a motor vehicle on London Road, Amersham, to fail to conform to the indication given by a traffic sign, "Stop, Road Traffic Officer, Bucks C. C.," being a sign for regulating the movement of traffic and being of the character authorized by the Minister of Transport under s. 48 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934, which had been lawfully placed on the said road in accordance with the directions of the Minister of Transport given under the said s. 48.

A second information charged the appellant George Adams with failing to conform to the indication given by the said sign and therefore being guilty of an offence under s. 49.

Upon the hearing of the informations before the justices the following facts were proved or admitted: That by an authorization in writing of the Minister of Transport dated January 5, 1935, and expressed to be issued in pursuance of s. 48 of the Road Traffic Act, 1930, and to be subject to any directions which the Minister might give under that section, the Minister authorized or purported to authorize the erection, for the purpose of stopping any motor vehicle which a duly authorized person might require to be weighed pursuant to the provisions of s. 27 of the said Act, of traffic signs of the size, colour and type illustrated in a diagram attached to the authorization. The said diagram contained the words:

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"Stop, Road Traffic Officer, ... C. C." By directions dated January 5, 1935, the Minister also gave or purported to give directions as to the erection and use of the said traffic signs. That on July 10, 1936, an inspector of weights and measures of the Buckinghamshire County Council, being a person duly authorized by a highway authority for the purpose of s. 27 of the Act of 1930, was on duty in London Road, Amersham, and had there, on the side of the road, assembled a device comprising a board which could be revolved so that only one side would be in view of the drivers of approaching vehicles, or the driver of any particular approaching vehicle. One side of the said board contained the words "Stop, Road Traffic Officer, Bucks C. C.," and conformed in size, colour and type with the requirements of the Ministry. The other side of the board was blank. That the device was used to regulate the movement of traffic and was being used in conformity with the Minister's directions by the inspector, for the purpose of stopping motor vehicles which he required to be weighed pursuant to s. 27 of the Act of 1930; that it was so used on the said road about once in every fourteen days for a period of about eight hours during the daytime; and that on July 10, 1936, the appellant George Adams, an employee of the other appellants, was driving a heavy motor car, registered No. B.M.D. 4, along the said road, and although the board was exposed to his view, and was seen by him, he, acting upon the instructions of his employers, failed to stop.

On behalf of the present appellants it was contended that the device was not a traffic sign within the meaning of ss. 48 or 49 of the Act of 1930; that the purported authorization of the device by the Minister of Transport was ultra vires; and that the said road traffic officer had no authority and/or no right in law to stop motor vehicles travelling on the road.

For the present respondent it was contended that the authorization and directions issued by the Minister of Transport were intra vires and valid; that the said device was a traffic sign of the kind authorized, and was a traffic sign as defined and described in ss. 48 and 49 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934; that the device had been lawfully erected and was being lawfully used by such a person as was mentioned in the said authorization and directions and for the purposes therein specified; that the inspector had full authority and right in law to erect and use the said device, in conformity with the said directions, for the purposes of stopping any motor vehicle which he required to be weighed, pursuant to the provisions of s. 27 of the Act; and that the failure of George Adams to stop in conformity with the indication given by the device was an offence under s. 49.

The justices held that the said device was a traffic sign; that such motor vehicles as the authorized person wished to stop were traffic; that to stop a vehicle was to regulate its movement; and that the device conformed to the requirements of the Act, and the authorization and directions issued by the Minister of Transport were intra vires. The justices therefore found the offences proved and fined the company 2*l.* and dismissed the summons against the driver under the Probation of Offenders Act, 1907.

The defendants appealed.

Roland Oliver K.C. and *David Karmel* for the appellants.

J. P. Eddy K.C. and *Colin H. Pearson* for the respondent.

The arguments of counsel sufficiently appear from the case and judgment of the Court.

1937. April 15. LORD HEWART C.J. This is a case stated by justices for the county of Buckingham. It arises out of an information preferred by the present respondent against the appellants, Langley Cartage Co., Ld., charging that they did unlawfully aid, abet, counsel and procure one Adams, on a day in July last, who was driving a motor vehicle on London Road, Amersham, to fail to conform to the indication given by a traffic sign in these words: "Stop. Road Traffic Officer. Bucks County Council," being, the information said, a sign for regulating the movement of traffic and being of the character authorized by the Minister of Transport under s. 48 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934. The traffic sign, it is said, had been lawfully placed on that road in accordance with the directions of the Minister of Transport, given under s. 48 of the Act of 1930. The information was heard by the justices, and they convicted the appellants, and fined them *2l.*

The question raised by this Case is whether, upon the facts, the justices came to a correct determination in point of law. It was proved, among other things, that by an authorization in writing of the Minister, dated January 5, 1935, the Minister authorized the erection, for the purposes of stopping any motor vehicle which a duly authorized person might require to be weighed pursuant to the provisions of s. 27 of the Act, of traffic signs of a certain size, colour and type, illustrated in a diagram which was attached to that authorization; and it is further found that by directions dated January 5, 1935, the Minister gave certain directions as to the erection and use of the traffic signs which are referred to. Accordingly, on July 10, 1936, an inspector of weights and measures of the County Council, who was the person duly authorized, was on duty in London Road, and on the side of the road he had a portable device, comprising a board which could be revolved so that only one side would be in view of the drivers of approaching vehicles or the driver of a particular approaching vehicle. The words upon that board were the words which were authorized, and it is found that the device was used "to regulate the movement of traffic," and was being used in conformity with the said directions of the Minister by the said inspector, for the purpose of stopping motor vehicles which he required to be weighed pursuant to s. 27. On the day mentioned Adams, an employee of the first appellants, who was driving a heavy motor-car, saw this traffic sign, but, acting upon the instructions of the first appellants, failed to stop.

In those circumstances, it was contended in the court below, and the contention has been repeated here, that the device referred to was not a traffic sign within the meaning of s. 48 or s. 49 of the Act of 1930, and that the purported authorization by the Minister was ultra vires. On behalf of the respondent it was contended that the authorization and directions were intra vires and valid, that the device was a traffic sign of the kind authorized by the said authorization, and was a traffic sign as defined and described in ss. 48 and 49 of the Act of 1930, as amended by the Act of 1934. The justices came to the conclusion that the device was a traffic sign, that such motor vehicles as were sought to be stopped by the authorized person were traffic, that a stopping of a vehicle is a regulating of its movement, and, so holding, they came to the conclusion that the device conformed to the requirements of the Act, and that the authorization and directions issued by the Minister of Transport were therefore intra vires and valid.

In my opinion the conclusion at which the justices arrived was a correct conclusion, for the reasons which the justices have given. It is not necessary to explore these Sections. Section 48 enacts, by sub-s. 9 that " the expression ' traffic sign,' includes all signals, warning sign posts, direction posts, signs, or other devices for the guidance or direction of persons using roads " ; and s. 49, which deals with penalties, provides that : " Where a police constable is for the time being engaged in the regulation of traffic in a road, or where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road," then " any person driving or propelling any vehicle who (*a*) neglects or refuses to stop the vehicle or to make it proceed in or keep to a particular line of traffic when directed so to do by the police constable in the execution of his duty ; or "—and these are in this case the material words—" (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence." I have no doubt at all that this traffic sign came within the definition in s. 48, and that this person, the employee of the first appellants, failed to conform to the indication given, and properly given, by the sign. I think therefore that this appeal fails.

The second case, as I understand, is a reiteration of the same facts and contentions, with reference to the employee, Adams, and raises no further question.

HUMPHREYS J. I am of the same opinion. If the

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Humphreys J.

language of the statute were in any respect doubtful or ambiguous it might be possible to give effect to Mr. Roland Oliver's ingenious but, I think, misguided argument, which, as I understand it, was this: He says that throughout the statute there is obvious reluctance on the part of the Legislature to give power to anybody to stop a motor vehicle unless he is a policeman in uniform. Therefore it must be assumed that any sign authorizing a person, other than a policeman in uniform, to stop motor vehicles upon the road must be ultra vires the powers of the Minister of Transport, and he endeavoured to frighten the Court by holding out prospects of motor bandits who might in future be expected to forge signs of this character, and so induce persons to stop their motor vehicles, with the object of robbing them. It is to be observed, for one thing, that these signs are not permitted to be used during the hours of darkness at all. However that may be, in my view the language of the statute is plain, and quite clear. The sign in question is a sign directing the driver of a vehicle to stop. In my view it is really almost unarguable to say that a sign directing a motor vehicle to stop is not a sign regulating the movement of the motor vehicle. It also seems to me to be abundantly clear that such a sign comes within the language of sub-s. 9 of s. 48 of the Act, in which traffic signs are defined as, amongst other things, including "all signals, warning sign posts, direction posts, signs, or other devices for the guidance or direction of persons using roads." I agree that the appeal must be dismissed.

SINGLETON J. I agree, and I have nothing to add.

Appeals dismissed, with costs.

Solicitors for appellants: *Mawby, Barrie & Letts.*

Solicitors for respondent: *Pyke, Franklin & Gould, for G. R. Crouch, Aylesbury.*

A. W. G.

MUTUAL FINANCE, LIMITED *v.* JOHN WETTON & SONS, LIMITED.

1937
April 26.

Contract—Guarantee—Undue influence—Implied threat to prosecute a third party.

A guarantee was obtained from a family company under an implied threat to prosecute a member of the family who was alleged to have forged the signature of the company to a previous guarantee. It was known to the receiver of the guarantee that it was only given because the father of the alleged forger was in such a state of health that the shock of the prosecution of his son was likely to endanger his life:—

Held, that the guarantee was obtained by undue influence, and the guarantors were entitled to repudiate it.

ACTION on a guarantee.

The plaintiffs were Mutual Finance, Ld.

The defendants were John Wetton & Sons, Ld.

The action was tried at Manchester Assizes and his Lordship delivered his reserved judgment in London. The facts are fully set out in the judgment.

Maxwell Fyfe K.C. and *C. T. B. Leigh* for the plaintiffs.

Lynskey K.C. and *T. M. Backhouse* for the defendants.

PORTER J. This is an action on a guarantee dated February 3, 1936, signed by Percy Wetton on behalf of the defendant company.

It was at one time contended that Percy Wetton had not the authority of the defendants to sign, but at the trial of the action that defence was discarded and the only question which I had to determine was whether the guarantee was binding on the defendant company, or whether it had been obtained by duress or undue influence.

The guarantee was given in the following circumstances. The defendant company was originally founded by the Wetton family, consisting of a father and two sons—that is, William Wetton, Percy Wetton, and Joseph Wetton. The first two were directors at all material times—the last-named had been a director until 1931, but had since that date ceased to be a director or, indeed, to be in any way connected with the business, and had started a business of his own. The defendants were quarry owners, who sold stone, and for that purpose owned their own wagons and also contracted with outside firms of carters for carriage. Joseph Wetton also carried on the business of quarrying and selling stone and, I think, of carting, and for those purposes would find a lorry useful. I gather him to have been an unsatisfactory member of the defendant company and generally unsatisfactory in his business relations; so much so, that he had been forced to leave the defendant company and had caused great anxiety and grief to his father.

The plaintiff company was formed for the purpose of financing, and does finance, the purchase of motor-cars and lorries on the hire purchase system. A bargain being concluded between a seller and a buyer for the sale of a vehicle on hire purchase terms, the plaintiffs purchase it from the seller and let it on hire purchase to the buyer, the sum so obtained including a percentage to them for their risk and trouble.

The sellers in the present instance were a company named G. W. Smith (1925), Ld., who were approached by a purchaser named Fred Clarke, and by Joseph Wetton, at the end of 1935, Clarke desiring to purchase a Foden lorry for which a price of 920*l*. was charged—namely, 50*l*. cash and 24 instalments of 36*l*. 15*s*. each. The plaintiffs were asked to finance the transaction and as a condition of doing so they (1.) required a counter guarantee from the defendant company, (2.) required a counter guarantee from the sellers, and (3.) agreed, with the assent of the sellers, to transfer the lorry and the contract of purchase to the defendants in case they were called on to fulfil their guarantee. They were accordingly furnished by Joseph Wetton with a guarantee dated December 4, 1935, purporting to be signed by William and Percy Wetton and witnessed by Joseph Wetton. In fact, however, the whole document appears to have been concocted by Joseph Wetton without the knowledge of his father or brother. Having obtained what they imagined was a valid guarantee, the plaintiffs on the same date handed their cheque for 750*l*. to the sellers, and the lorry was handed over to Clarke.

On December 5, 1935, the plaintiffs sent a copy of the so-called guarantee to the defendant company, but this document was, as I find, suppressed by Joseph Wetton, who was then living at home with his father and brother, and never reached the defendant company. Clarke almost at once fell behind with his payments, and the plaintiffs, both by letter and telephone, demanded fulfilment of the guarantee. This demand immediately brought a repudiation of liability from the secretary of the company on January 9, 1936. A reiterated demand on January 11 was in its turn repudiated by the defendants on January 14.

On January 14 the plaintiffs determined the hiring and demanded the return of the lorry, and on January 16 issued a certificate of authority to seize the vehicle. In addition to the seizure of the lorry the plaintiffs were minded to obtain what advantage they could from the bogus guarantee which they held. It is true that they themselves were protected by the counter guarantee of the sellers, but they desired to stand well with them, so as to obtain as much further business as they could. Accordingly a Mr. Lopresti, the plaintiff's local manager, arranged to visit the defendants on January 16. At that time Clarke had found a Mr. Gregory who might take over the agreement on terms, but Lopresti was anxious that the defendants should admit their liability, believed that Joseph Wetton had been guilty of forgery, thought that the family were unlikely to permit a prosecution, and was prepared to make use of that unwillingness to obtain an acknowledgment of their liability. He had not, however, made up his mind to prosecute, though the sellers were anxious to do so.

The interview took place on January 16. As to this interview I find the following facts: Lopresti and a Mr. Wales, general manager of the sellers, were present as well as Percy Wetton and J. G. Mottershead, the defendants' secretary. Lopresti asked if the signatures were genuine, and both Percy Wetton and Mottershead refused to admit their genuineness, but from a desire not to commit Joseph did not say in terms that they were forgeries. Lopresti, however, had no doubt that they were forgeries, and said that it was a serious matter for Joseph, and that he could take out a warrant for his arrest. Percy Wetton said that he was not himself interested, but that his father was very ill, so ill that he could not tell his father, and that if Joseph were arrested it might cause his death. Lopresti then said that Gregory was prepared to take over the agreement, and suggested that the defendants should guarantee a substituted agreement with Gregory. Percy Wetton, after again saying he was not interested, consented to consider the matter, but stated that in his view the price of 800*l.* was excessive, and left the matter for further discussion between Gregory, the sellers, and the plaintiffs.

No definite threat in terms was used, but Lopresti knew that the defendants were only leaving the matter open for settlement in order to save one of the family from the consequences of his action. He knew, it is true, that Percy would not have objected, if he alone had been concerned, to his brother being prosecuted, but that owing to his father's health he was prepared to consider an agreement rather than have his brother prosecuted. No assertion of an intention to prosecute if an agreement was not come to was made, nor did the plaintiffs promise not to prosecute if the defendants entered into a new guarantee. But both parties had this question of prosecution in mind and Lopresti meant and intended that the possibility of a prosecution should influence Percy in undertaking the liability, and Percy was to his knowledge so influenced. As both parties knew, the guarantee would never have been signed but for the fear of the prosecution of Joseph if the defendants did not agree.

A further interview took place on January 22, 1936, at which Lopresti, Percy Wetton, and Mottershead were present. A conversation on the same lines took place. Again, I do not find any direct threats, but the seriousness of Joseph's position and the possibility of his arrest were mentioned by Lopresti, and all parties knew that the basis of settlement was the avoidance of the possibility of the arrest and prosecution of Joseph. At this interview Percy Wetton agreed, on behalf of the firm, to sign a guarantee if terms which Gregory would accept could be arranged. By January 28 terms had been arranged, and the defendants' promise to sign a guarantee was confirmed by a telephone message on January 30.

On February 3 Lopresti again came to Wetton's office, accompanied by Gregory, bringing with him the form of guarantee sued on in this action. Mottershead and Percy Wetton were present. Gregory said that he was prepared to take over the lorry on the terms agreed, but Percy Wetton refused to sign. Lopresti again pointed out the seriousness of the matter for Joseph if nothing were done, and Percy Wetton said that he would have to think over the matter. The agreement was accordingly left with him. On the same day he signed and sent it to the plaintiffs, in order to prevent his father knowing of the possibility of Joseph's arrest and to avoid the danger to his father's health of such knowledge. Lopresti knew this was the sole reason why Percy Wetton signed the document, and intended that he should be influenced by fear for his father's health. For the sake of safety the plaintiffs endeavoured to obtain the signatures of both William Wetton, the father, and Percy Wetton to the guarantee under the company's seal, and later asked to see the company's articles, but did not persist in this demand on receipt of a letter from Mottershead refusing to do anything further and stating that the company had yet to repudiate its undertakings.

Between January 16, when the suggestion that Gregory should take over the lorry was first made, and the arrangement of the final terms, a considerable amount of discussion had taken place between the sellers, Gregory, and Lopresti, and the original terms had been considerably modified in favour of Gregory, and the defendants as his guarantors. Immediately on the signing of the guarantee the lorry was in form bought back by the sellers from the plaintiffs and resold to them again, and by the plaintiffs let on a hire purchase agreement to Gregory. Gregory made certain payments under his agreement to the plaintiffs, partly directly, and later through the medium of the defendants, who owed him money and who, instead of paying him, discharged their indebtedness by meeting the instalments as they became due. Eventually, however, Gregory defaulted in his payments, and on November 17, 1936, the plaintiffs determined the agreement and on December 11 called on the defendants to fulfil their undertaking. The defendants failed to pay and this action was brought.

Prima facie the plaintiffs are entitled to recover. They have a guarantee deliberately made and in due form. But it is said that that guarantee is voidable because it was obtained by duress or by undue influence. If the question were whether there was any such duress as the common law would recognize, I should unhesitatingly answer, No. But the right to avoid a contract is not at the present time confined to questions of duress. It depends on the much wider relief given on principles originally evolved in the Chancery Courts under the name of undue influence.

The problem is, I think, well stated in Salmond on Contracts, 1927 ed., p. 259: "Assuming, then, that the common law of duress has been thus superseded by the equitable doctrine of undue influence, the question remains, What forms of coercion, oppression, or compulsion amount to undue influence invalidating a contract as between strangers between whom there exists no fiduciary relation? How is the line to be now drawn between those forms of coercion or persuasion which are permissible and those which the law recognizes as unlawful and as a ground of contractual invalidity? To this question it is impossible, as the authorities at present stand, to give any definite or confident reply. In the case already cited of *Kaufman* v. *Gerson* (1) it is suggested that the line should be drawn by reference to general considerations of public policy, the question in each case being: 'Is the coercion or persuasion by which this contract was procured of such a nature that the enforcement of a contract so obtained would be contrary to public policy?' Just as a contract may be invalid because it is contrary to public policy in its substance or its purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement. If this is the true underlying principle, it is for the law in its future development to reduce this general principle so far as possible to the form of specific rules in respect of divers methods of coercion, just as the requirements of public policy have been similarly made specific in respect of illegal and nugatory contracts. Where the instrument of coercion is the doing or threatening of a wilfully illegal act of any description, it may be anticipated that, notwithstanding the limits of the older common law of duress, a contract so procured will in general be held invalid. But even although the instrument of coercion is not thus in itself illegal, as in the case of a threat of prosecution, the enforcement of a contract so procured may nevertheless be held in appropriate cases to be contrary to public policy." That states the problem, but by no means solves it.

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(1) [1904] 1 K. B. 591.

Duress at common law could only be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful force against the person of the other contracting party. Undue influence in the Chancery Courts might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise were given. It is not necessary that there should be any direct threat. The headnote in *Williams* v. *Bayley* (1) setting out the principle deduced from the speech of Lord Westbury is, I think, a correct exposition of the law.

Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place: see *Jones* v. *Merionethshire Permanent Benefit Building Society*. (2)

Kaufman v. *Gerson* (3) is another example of the principle applied in *Williams* v. *Bayley* (1), but in the former case the underlying threat was the prosecution of the husband, while

(1) (1866) L. R. 1 H. L. 200, 216.

(2) [1892] 1 Ch. 173.

(3) [1904] 1 K. B. 591.

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in the latter case it was of a son. In *Seear* v. *Cohen* (1) the same principle was applied in a case where the underlying threat was against the son of one of the defendants and the nephew of the other, and in *Brook* v. *Hook* (2) against the brother-in-law of the defendant.

Is the principle wide enough to cover the case where the persons involved are the brother and father of the alleged criminal? I think it is. It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution or possibility of prosecution of the person implicated, and were known and intended to have been so influenced by the person in whose favour the undertaking was given. Nor do I think it matters that Percy Wetton would not have cared, if he alone were concerned, whether his brother went to prison or not. In fact he did care, and Lopresti knew that he cared, owing to his fear of the effect on his father's health. If the known object was to prevent the prosecution of his brother for whatever reason, that, I think, is enough.

But it is said that in all the cases cited the sole consideration was to stifle a prosecution, whereas in the present case the agreement which was made concerned four parties—namely, the plaintiffs, the defendants, Gregory, and the sellers—and that just as a debtor may secure his debt though the object be to avoid a prosecution, as in *Flower* v. *Sadler* (3), because there is a further consideration, so, an agreement which results in the sale of a lorry by one person to another, the hiring by that other to a third person, and the guarantee of the hirer's debt by a fourth, is a perfectly legitimate transaction, though the result may be and was intended to be the stifling of a prosecution.

In my view, however, the question is what was the person giving the guarantee in substance doing and intending to do to the knowledge of the person to whom the guarantee was given? In the present case the defendants gained no benefit for themselves and, as I find, were known by the plaintiffs to be gaining no benefit. The sellers had the same knowledge as the plaintiffs, and the fact that Gregory had a lorry delivered to him on hire purchase at an excessive price does not, in my view, affect the right of the debtor to avoid the contract.

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(1) 45 L. T. R. 589.

(2) (1871) L. R. 6 Ex. 89.

(3) (1882) 10 Q. B. D. 572.

It was further argued before me that the defendants' guarantee, if obtained by undue influence, was voidable and not void, and that as it was not repudiated at the earliest possible moment the defendants had affirmed it. But what is the earliest possible moment? In my view it is the earliest moment at which the undue influence has ceased to operate: see per Collins M.R. in *Kaufman* v. *Gerson*. (1)

In the present case, up to the issue of the writ the defendants were always subject to the fear of a prosecution of Joseph Wetton and were never free agents. I think that they did avoid the contract in time. For these reasons I think that the defendants are entitled to avoid the guarantee. There will be judgment for the defendants, with costs.

Solicitors for the plaintiffs: *Hedley Norris & Co., for Vaudrey, Osborne & Mellor, Manchester.*

Solicitors for the defendants: *A. H. W. Wragg, Manchester.*

(1) [1904] 1 K. B. 591, 596.

A. W. G.

C. A.

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April 28, 29.

WEST *v.* AUTOMATIC SALESMAN, LIMITED.

County court—Execution—Claim to goods by third party—Interpleader—Successful claim to goods but no claim for damages by claimant in interpleader proceedings—Right of claimant to bring subsequent action for damages—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 157.

Where, in proceedings on an interpleader summons under the County Courts Act, 1888, s. 157, between a claimant to goods taken in execution and the execution creditor, the claimant has made a successful claim to the goods but no claim for damages, he cannot afterwards maintain a separate action against the execution creditor for damages.

Death v. *Harrison* (1870) L. R. 6 Ex. 15 followed.

Salbstein v. *Isaacs & Son* [1916] 1 K. B. 1 observations adopted.

Henderson v. *Henderson* (1843) 3 Hare, 100, 114 principle applied.

Appeal from Salford County Court.

A company called Automatic Salesman, Ld., recovered judgment for a debt against a Mr. West, who resided at 163 Russell Street, Moss Side, Manchester, of which house his mother, Mrs. Emma Jane West, widow, was the tenant and occupier.

The debt not having been paid execution proceedings were taken for its recovery. The bailiffs visited that house on several occasions, and eventually on June 9, 1936, an execution in respect of the debt was levied at the house and certain articles of furniture were seized and removed therefrom.

Mrs. West alleged that these articles belonged to her, and on a summons under the County Courts Act, 1888, s. 157, interpleader proceedings took place between her as claimant and the company as execution creditors in which she made a claim to the goods but no claim to damages.

On June 24, 1936, in these proceedings an adjudication was made in her favour for the goods, and they were thereupon returned to her.

In October, 1936, Mrs. West brought the present action in the county court against the company, alleging in her particulars of claim that on June 9, 1936, upon the instructions of the defendants certain bailiffs wrongfully entered the said premises occupied by her and seized certain goods and chattels, to wit two sideboards, one desk, and one hall-stand belonging to her; that in so doing the said servants or agents of the defendants trespassed to the goods of the plaintiff, and the execution which the defendants purported to levy was wrongful and illegal, inasmuch as the plaintiff was not indebted to the defendants; that the said servants or agents of the defendants wrongfully removed the goods and detained them till June 29, 1936, when they were returned in a damaged condition; and that the plaintiff claimed damages limited to 30*l.*

The defendants in their particulars of defence stated that they made no admissions as to any of the allegations in the particulars of claim; that, if (which was not admitted) the bailiffs acted as alleged, they were not the servants or agents of the defendants and were not authorized by the defendants to act as alleged; and that the particulars of claim disclosed no cause of action.

On December 4, 1936, the county court judge gave judgment in the action, finding that there had been personal interference by the defendants in regard to the execution proceedings, and that the plaintiff had suffered damage; but holding that he was bound on the authority of *Death* v. *Harrison* (1) to decide that the plaintiff should have made her claim for damages in the interpleader proceedings, and that as she had not made it in these proceedings she could never make it.

The plaintiff appealed on the grounds: (1.) that the judge was wrong in law in holding that the plaintiff was precluded from bringing her action for damages after the interpleader proceedings had been decided in her favour; (2.) that having found as a fact that there had been personal intervention by the defendants in the distress the judge was wrong in law in finding for the defendants; (3.) that inasmuch as the entry upon the plaintiff's premises was unlawful ab initio, the judge was wrong in holding that the case was within the facts of *Death* v. *Harrison* (1); and (4.) that inasmuch as the damage

(1) (1870) L. R. 6 Ex. 15.

which the plaintiff had sustained could not be ascertained until the goods distrained upon by the defendants had been returned, the judge was wrong in holding that the plaintiff could not bring an action for damages against the defendants.

W. W. Stabb for the plaintiff, appellant. The decision appealed from was wrong and should be reversed. The plaintiff is not prevented by any statute or decision from maintaining an action against the defendants for damages in respect of the wrongful entry upon her premises and the wrongful seizure of and damage to her goods, notwithstanding that she made no claim to damages in the interpleader proceedings. Jurisdiction in interpleader in respect of goods taken in execution was first given by the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 118. The decisions under that section show that it was then doubtful whether a claimant who had not claimed damages in the interpleader proceedings could afterwards bring an action in respect of them: see *Chater* v. *Chignell* (1); *Mercer* v. *Stanbury* (2); *Foster* v. *Pritchard* (3); and *Jones* v. *Williams*. (4) That section was repealed by the County Courts Act, 1867 (30 & 31 Vict. c. 142), and replaced in an altered form by s. 31 of the latter Act. The latter Act was repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43), but s. 31 thereof was reproduced in almost identical terms as s. 157 of the last mentioned Act. (5) It is submitted that the provision in its later form under the two last mentioned Acts is on the true construction not mandatory but permissive, and that when so understood it is free from the doubt which attached to it in its earlier form. It is true that in the case of *Death* v. *Harrison* (6), which was relied upon by the county court judge, it was held that where an interpleader summons under s. 31 of the Act of 1867 had been adjudicated upon the claimant could not afterwards maintain a separate action for damages arising out of the execution. That case was wrongly decided, as it treated

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(1) (1850) 15 Q. B. 217.

(2) (1857) 2 H. & N. 155; 25 L. J. (Ex.) 316.

(3) (1857) 2 H. & N. 151.

(4) (1859) 4 H. & N. 706.

(5) The section, so far as material, is set out below in the judgment of Slesser L.J.

(6) L. R. 6 Ex. 15.

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the section as mandatory and not permissive. The county court judge also referred to a rule in the County Court Rules which were in force at the time when this action was brought —namely, the County Court Rules, 1903 to 1935, Order XXVII., r. 8 (1), which provides that in interpleader proceedings the claimant shall in the particulars of his claim to the goods state the amount he claims for damages; and he particularly relied upon the note to that rule in the Annual County Courts Practice, 1936, to the effect that it is probably necessary that, where damages are claimed from the execution creditor, the claim should be made in the interpleader proceedings and not by independent action. That rule, however, does not say that, if the claimant does not claim damages in the interpleader proceedings, he may not claim them otherwise; and as to the note that merely states the opinion of an editor which is not expressed with any great degree of confidence. If the plaintiff had made a claim for damages in the interpleader proceedings it might no doubt have been said that the matter was res judicata, but that cannot be said where he has made no claim. Before the Acts came into force the claimant would have had a right at common law to bring an action for damages. The Acts might no doubt have deprived her of that right by a clear and definite provision to that effect, but they contain no such provision. The Acts by giving the claimant a right to recover damages in the interpleader proceedings do not necessarily exclude any alternative remedy which she may possess. The case of *Salbstein* v. *Isaacs & Son* (2) was a case remitted from the High Court to the county court to which different rules apply, and the observations of the judges in that case in regard to interpleader proceedings commenced in the county court are only obiter dicta.

H. J. Phillimore and *J. L. S. Hale* for the defendants, respondents, were not called upon to argue.

SLESSER L.J. This is an interesting case which was well

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(1) See now County Court Rules, 1937, Order XXVIII., r. 11.
(2) [1916] 1 K. B. 1.

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worth bringing to the Court. The question arises in these circumstances. A company called the Automatic Salesman, Ld., having obtained a judgment in the county court against a Mr. West, improperly levied execution upon the furniture of a Mrs. Emma Jane West, against whom they had no claim or title. On the lady demanding her furniture, an interpleader issue was ordered in which she made a claim to the furniture but no claim to damages, and on that issue the court made an adjudication in her favour for the furniture. The lady then proceeded to bring this action for damages against the company in respect of the wrongful entry on her premises, and the wrongful seizure of her goods. The defendants raised the question whether, in the circumstances, she had any right to maintain the action or the judge any jurisdiction to entertain it by reason of the fact that in the interpleader proceedings she had failed to make any claim for damages. The county court judge decided that question in favour of the defendants, and it now comes before this Court for consideration.

By s. 31 of the County Courts Act, 1867, it was provided that where a claim was made to goods taken in execution and interpleader proceedings resulted the proper time for the claimant to make any claim for damages was at the hearing of the interpleader proceedings and not afterwards. That provision has been repeated in substantially the same terms in s. 157 of the present County Courts Act, 1888, which, so far as it is material, is as follows: "If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and the judge shall adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as he shall think fit," Then follow these all-important words: "and shall also adjudicate between such parties, or either

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of them, and the high bailiff, with respect to any damage, or claim of or to damages, arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit; . . . ."

We were favoured by counsel with the cases which preceded that legislation, but I do not think it is necessary here to discuss them, beyond saying that they show that there was doubt before that time how far an action for damages would lie when there had been in interpleader proceedings a successful claim to the goods, more particularly in relation to the question of wrongful seizure as distinguished from wrongful entry. But, however that may be, this statute lays down clearly, as I think, not only the rights of the parties but also the means whereby those rights are to be enforced.

It is to be noted that the language of the section is not, as Mr. Stabb contends it should be read, that the judge *may* adjudicate upon such claims to damages as the claimant may think fit to bring before him. It is not merely permissive, in which case there might or might not be a question whether the power to claim damages in the interpleader necessarily exhausted the rights of the parties to proceed by other means. It seems to me to lay down, as a condition of the right of the claimant to obtain damages arising out of the execution, a specific machinery whereby, and whereby only, a claim can be enforced. The language is that the judge " *shall* also adjudicate . . . . with respect to any damage or claim." I think those words are significant as showing that the judge has the obligation to adjudicate not only in regard to a claim to the goods but in regard to damages arising or capable of arising out of the execution.

That is the view which I would have taken had the matter been free from authority, but there are two cases: one decided under the earlier Act of 1867 and one which follows the Act of 1888, which seem, the one to be conclusive of the point, and the other to support it inferentially.

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The earlier case is *Death* v. *Harrison* (1), where the facts were in effect similar to those in the present case. Although there was a claim for wrongful entry as well as for seizure, I do not think that affects the matter at all. In that case the plaintiff had delivered particulars of his claim under the interpleader but did not make any claim for damages arising or capable of arising out of the seizure or claim. Martin B. said (2): "I am expressing the opinion I entertained when this point was before the Court on a former occasion and received a great deal of attention. The plea brings the case entirely within the words of the statute;"—there is no question about it there—"the entry is justified, and the only point not explicitly stated is, that the summons was issued at the request of the high bailiff; but, by the Act, this must have been so. The case then being within the words of the statute, s. 31 says expressly that the order made shall be final and conclusive. This is equivalent to saying that the whole matter between the parties shall be at an end; and I have no doubt that the words were inserted with that very intention. The legislature directed this measure to meet the exigencies of common affairs, notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted. My Brother Channell has desired me to say that he is of the same opinion." Cleasby B. puts it in this way (3): "This plea is in substance a plea of res judicata; it shows that though the particular claim of special damage was not in controversy, the subject-matter out of which it arose was, and that in that proceeding a claim of special damage was properly open to adjudication." That seems to me exactly to follow the language of the statute which I have referred to. "If the plaintiff had made his claim then, it could not be said that it could now be agitated again. But it is the same thing if the reason why the judge did not adjudicate upon it was that the plaintiff did not give particulars of his claim." These judgments state the practice as it existed in 1870, and, as I understand it, the practice which has been continued ever since.

(1) L. R. 6 Ex. 15. (2) Ibid. 18. (3) Ibid. 19.

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As I have said, the provision on which that case was decided was re-enacted in the County Courts Act, 1888. In the case of *Salbstein* v. *Isaacs & Son* (1), which was decided after the latter Act, the circumstances were different from those of the present case; but a question arose as to the right of a claimant in interpleader to bring an action in the county court claiming damages for trespass to his goods. In that case the defendants had obtained a judgment in the High Court and issued a writ of execution, there being an execution levied by direction of Salbstein in connection with the matter. The facts are thus stated in the report of the case (2): "The plaintiff claimed the goods seized, and on the application of the sheriff an order was made that an issue should be tried between the claimant and the execution creditors and that the interpleader proceeding should be remitted to the Croydon County Court. In the county court the plaintiff did not make any claim for damages against the present defendants, and the issue as to the ownership of the goods was decided in his favour. The plaintiff thereupon brought this action for damages, and the defendants set up the defence that there was no jurisdiction to award damages inasmuch as any claim for damages ought to have been made in the interpleader proceeding. The county court judge gave judgment in favour of the plaintiff for 5*l.* 5*s.* damages." Various questions which do not directly concern us were there canvassed about the rule relating to the matter, what were its extent and authority, and whether it was ultra vires or not. But it is important to note in reading the judgments in that case that both the learned judges formed the same opinion as to the conclusiveness of what was done on the interpleader proceedings. It does not appear that the case of *Death* v. *Harrison* (3) was either cited in argument or considered in the judgments, but Avory J. there said (4): "The main point is that the judge had no jurisdiction because the claim for damages could only be put forward in the interpleader proceeding." Then he continued: "To this extent I agree

(1) [1916] 1 K. B. 1.
(2) Ibid. 2.
(3) L. R. 6 Ex. 15.
(4) [1916] 1 K. B. 1, 4.

with that contention, that the rule contemplates that any claim for damages in interpleader proceedings commenced in the county court, to which the high bailiff is a party, should be dealt with at the same time as the claim to the goods." Lush J. said (1): "Order XXVII., r. 8"—that is the Order which was made under the section of the County Courts Act—"does seem to make it obligatory upon a claimant in interpleader, if he seeks to claim damages against the high bailiff, or execution creditor, to make that claim at the hearing of the interpleader issue. The rule seems to say so imperatively." To which I would add that not only the rule but also s. 157 seems to make the matter imperative.

The only other observation I would make is that, as a matter of general principle, I think this case falls within the rule stated by Wigram V.-C. in the case of *Henderson* v. *Henderson.* (2) The learned Vice-Chancellor there said: "I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

In the present case, so far from there being special circumstances justifying a separate action for damages, I think there was an obligation imposed upon the claimant by the statute, and the rule under the statute, to make her claim for damages at the time of the interpleader proceedings.

The practice which has been carried out since the present provision came into force is consistent and right, and this claimant in failing to bring her action for damages in the manner contemplated in s. 157 of the Act of 1888 and the rule thereunder, disentitled herself to make any further claim. In my view the learned judge was right in refusing to hear the matter, and this appeal should therefore fail.

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(1) [1916] 1 K. B. 5.

(2) 3 Hare, 100, 114.

DU PARCQ J. I agree, and have nothing to add.

SIMONDS J. I agree.

Appeal dismissed.

Solicitors for appellant: *C. J. Lewis, for R. Caradoc Roberts & Co., Manchester.*

Solicitors for respondents: *Reid Sharman & Co.*

J. R.

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April 29, 30.

THE KING *v.* HORSHAM AND WORTHING ASSESSMENT COMMITTEE.

Ex parte BURGESS.

Rating—Valuation List—Representation by County Valuation Committee to Rating Authority—Revaluation of certain classes of property—Many thousands of proposals by Rating Authority—Whether permissible—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37.

A county valuation committee notified a borough rating authority in the county that in the opinion of the committee the quinquennial valuation list for the borough, which had recently come into force, was not in accordance with the Rating and Valuation Act, 1925, in the matter of gross values. After a conference with the county valuation committee, the rating authority were satisfied that a very large number of assessments of shops, houses and flats in the borough were incorrect, and ought to be increased. They accordingly made many thousands of proposals for the amendment of the valuation list, and a large number of objections fell to be decided by the assessment committee. It was sought to quash the assessment committee's decision on one such objection on the grounds (*a*) that no such proposal for the amendment of a valuation list could lawfully be made under s. 37 of the Rating and Valuation Act, 1925; (*b*) that s. 37 of that Act did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list; and (*c*) that the rating authority could not be "aggrieved" within the meaning of that section:—

Held, that since the rating authority were merely correcting existing inaccuracies in the valuation list, and were not making a new valuation on the ground of any alleged general increase in values, they were not, in truth any more than in form, making a new valuation list, and were acting within s. 37, though on a large scale, and that the rating authority might well be aggrieved both as a local authority and as a ratepayer by the acceptance of incorrect values by the assessment committee in the quinquennial valuation list.

Camberwell Assessment Committee v. *Ellis* [1900] A. C. 510 distinguished.

RULE NISI for certiorari.

The second draft valuation list for the borough of Worthing under the Rating and Valuation Act, 1925, was finally approved by the Horsham and Worthing Assessment Committee on

January 31, 1934, and came into force on April 1, 1934. By a letter addressed to the town clerk of Worthing on November 3, 1934, the clerk to the West Sussex County Valuation Committee informed him that the county valuation committee were not satisfied that the new valuation list for the borough complied with the requirements of the Act of 1925, in the matter of gross values, and invited representatives of the rating authority to confer with the county valuation committee on the matter.

After a conference between representatives of the rating authority and the county valuation committee, the former were satisfied that very many assessments of shops, houses and flats in the borough were incorrect, and on December 14, 1934, the rating and valuation committee of the Worthing Council resolved that a revaluation of premises be carried out with a view to proposals being made for the amendment of the valuation list.

On May 14, 1935, 1318 proposals relating to shops were made in the name of the Council of the borough of Worthing. Of these proposals 505 were allowed without objection, and 813 objections were heard and determined by the assessment committee. On April 30, 1936, the rating and valuation committee made 14,813 further proposals, relating in the main to dwelling-houses and flats. Objections to these proposals numbered 4338. Among them was that of the applicant for the rule, Mrs. Burgess, whose assessment it was proposed to increase from 12*l.* gross and 7*l.* rateable to 18*l.* gross and 11*l.* rateable. On the hearing of her objection the assessment committee increased the assessment to 15*l.* gross and 9*l.* rateable.

This rule was then obtained calling on the assessment committee to show cause why that decision should not be quashed, on the grounds that in the circumstances of this case (*a*) No such proposal for the amendment of a valuation list could lawfully be made under s. 37 of the Rating and Valuation Act, 1925 (1). (*b*) Sect. 37 of the Rating and Valuation Act,

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(1) The Rating and Valuation Act, 1925, s. 18, sub-s. 1: "For the purposes of this Part of this Act there shall be established in every county a committee of the county council (to be called 'the county valuation committee') consisting of such number of persons, being members of the council of the county, as the

1925, did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list. (*c*) The rating authority

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council may think fit to appoint and of a representative of the assessment committee for each assessment area which, or any part of which, is comprised in the area of the county to be nominated by the assessment committee."

Sub-s. 2 : " It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees . . . . and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference."

Sub-s. 3 : " A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this Part of this Act : . . . . "

Sects. 19 to 30 deal with the quinquennial valuation lists under the Act, and the preparation of the draft lists, making and determination of objections thereto, and final approval of the lists.

Sect. 37 (under the heading " revision of current lists "), sub-s. 1 : " Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as ' a proposal '), and where a rating authority in pursuance of the provisions of this Act make any amendment in a rate other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission, or misdescription, the authority shall forthwith make a proposal for any necessary amendment of the list."

Sub-s. 3 : " The rating authority shall, within seven days after the date on which the proposal is made by or served on them transmit a copy thereof . . . . to the occupier. "

Sub-s. 7 : " The assessment committee shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this Part of this Act relating to the hearing and determining of such an objection shall apply accordingly."

could not be "aggrieved" within the meaning of s. 37 of the Rating and Valuation Act, 1925.

J. Scott Henderson (*F. J. Tucker K.C.* with him), for the assessment committee, showing cause against the rule. It is contended by the applicant that a rating authority is so connected with the making of a valuation list that it cannot make a proposal to amend that list unless there has been some change of circumstances, and that, in any case, a rating authority cannot be a "person aggrieved" within s. 37 of the Rating and Valuation Act, 1925. So far as the assessment committee, in the present case, is concerned, however, the rating authority was prima facie entitled to make a proposal to amend the list and the assessment committee was not only entitled, but was also under a duty, to hear and determine the proposal under s. 37, sub-s. 7, of the Act.

Comyns Carr K.C. and *Michael Rowe*, for the rating authority, showing cause. The contention that, because s. 19 of the Rating and Valuation Act, 1925, provides for the making of a new valuation list every five years, no alteration can be made in a list so comprehensive as to result in the production of a new list ignores the provisions of s. 37, sub-s. 1, of the Act and the purpose of s. 19. Sect. 37, sub-s. 1, provides for the amendment of a current valuation list whenever there is "incorrectness or unfairness" and there is nothing in the Act to prevent the whole list being revised if it is shown to be incorrect or unfair. Sect. 37 is entirely at large as to the number and extent of the proposals which may be made. Moreover, the intention of s. 19 is not to prevent what may amount to the preparation of a new list as often as the need for correctness or fairness demands it. The intention of the section is to secure that a new valuation list shall be made at least every five years so as to prevent the undue perpetuation of errors. In fact, it is incorrect to say that a new list is being created in the present case. The rating authority in the present case can be a person aggrieved within s. 37, sub-s. 1, as being (*a*) a local authority by reason of the fact that it is the rating authority; (*b*) a local authority apart from that

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fact; and (*c*) a ratepayer. A rating authority has power to correct its own errors. [They referred to *Rex* v. *South-Eastern Essex Assessment Committee; Ex parte Patterson* (1), and submitted that *Harrup* v. *Bayley* (2) was distinguishable.]

Trustram Eve K.C. and *G. D. Squibb* in support of the rule. Sect. 37 of the Act of 1925 gives to an assessment committee power merely to amend the current list, the proposals that can be made being limited by s. 37, sub-s. 1, to a "proposal for the amendment of the list." The whole scheme of the Act is to provide for a quinquennial list, subject to amendment where necessary, and nothing can be done which has the effect of creating a new list as distinct from amending a current list. To alter every item, or practically every item, in a current list is not to amend it. It is to redraft it.

The language of the Valuation (Metropolis) Act, 1869, ss. 43, 45–47, 71 and 72, was very similar to the language of the Act of 1925 dealing with the same matters. When that Act had been in force a long time, it was contended in *Camberwell Assessment Committee* v. *Ellis* (3) that ss. 46 and 47 were perfectly wide, and that a general correction of the list could be made where a general change had taken place from any cause. For the ratepayers it was said: "No; if ss. 46 and 47 had stood alone there might have been much to be said for the rating authority's construction, but those sections occur in an Act which makes provision for a quinquennial valuation." The House of Lords held that it was not enough to show a change in value, without also showing a cause affecting the particular hereditament. So s. 37 of the Act of 1925 must be read in the light of s. 19, which provides for the quinquennial list. Sect. 37 applies to something which has *become* incorrect since the making of the quinquennial valuation list, not to something which simply is, in fact, incorrect. There must be a change either from actual correctness to actual incorrectness, or from hypothetical correctness to actual incorrectness. It is the essence of our case that those showing cause are acting contrary to the principle of quinquennial valuation. See per Lord Davey in *Camberwell Assessment Committee* v. *Ellis* (1), where he says: "If it were sufficient to show that there has been a general increase in value in order to obtain a new assessment it appears to me . . . . that you would to a very large extent be nullifying the provisions of the statute and depriving the statute of much of the beneficial results which it was expected to have."

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(1) (1935) 153 L. T. 152.
(2) (1856) 6 E. & B. 218.
(3) [1900] A. C. 510.

If one may substitute for the words "general increase in value" in that passage the words "general incorrectness," it is submitted that to allow wholesale amendment on the ground of general incorrectness is, in effect, to repeal the statute.

Sect. 18 of the Act of 1925, it is true, introduces a new body, the county valuation committee; but so far as amendment is concerned, its duties and powers are the same as those of the rating authority—namely, to make objections to the draft list, and to make proposals for the amendment of the list. The next group of sections, beginning with s. 19, are almost identical in wording with the Valuation (Metropolis) Act, 1869. It is now put against us that s. 19 means "You *shall* make a new list at least every five years, but there is nothing to prevent you from making a new list in the meantime." A similar argument was open in *Camberwell Assessment Committee* v. *Ellis*. (1)

It is the duty of the rating authority under s. 22 to make the draft list in accordance with that section; but if the argument against the rule is correct, the rating authority, within twenty-one days after their own draft list, can lodge an entirely new one by way of objection. Once the list has been finally approved it is, by s. 28, sub-s. 3, "deemed to have been made in accordance with this Part of this Act," (including s. 22 and s. 68, which defines gross value). It is submitted that the only reasonable way of construing s. 37, is that there must be some form of change which has caused the incorrectness.

As to the third ground we say that no one can be "aggrieved" by a document of which he is the author. [They referred to *Rex* v. *South-Eastern Essex Assessment Committee. Ex parte Patterson*. (2)] It may be said that the rating authority can

(1) [1900] A. C. 510, 523.

(2) 153 L. T. 152.

be aggrieved by an error in the list, but s. 30 in terms empowers them to correct errors.

The argument may be summarized in three propositions:

(1.) Sect. 37 cannot be applied at all unless the list has *become* incorrect: *Camberwell Assessment Committee* v. *Ellis.* (1)

(2.) The rating authority cannot be aggrieved by its own valuation list.

(3.) They have made a new valuation list, not an amendment of the existing list.

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to remove into this Court a decision made on the proposal of the Mayor, Aldermen and Burgesses of the borough of Worthing, as rating authority, in pursuance of resolutions passed by the rating and valuation committee of the rating authority on December 14, 1934, and May 14, 1935.

The gist of the matter may, I think, be put shortly in this way. After the passing of the Rating and Valuation Act, 1925, there was established in every county a committee of the county council called the county valuation committee. [His Lordship read s. 18, sub-ss. 2 and 3.] That novel and important element having been introduced by the passing of the Act of 1925, it came about that in November, 1934, at a meeting of the rating and valuation committee at the town hall, Worthing, a letter dated November 3 from the clerk to the West Sussex County Council was submitted stating: "From information supplied by the county valuer, my committee are not satisfied that the new valuation list for the borough of Worthing complies with the requirements of the Act"—that is, the Rating and Valuation Act, 1925—and the letter enclosed a schedule of particular properties exhibiting "the difference between the definition of gross value under the Act, and the assessment of particular properties in Worthing." The climax and purport of that letter was to suggest that a conference between the representatives of the county council and the Worthing Council should be held to discuss the matter. That, it appears, was the inception of the course of events which developed into the present controversy. It was then resolved that certain named officials should be appointed to meet representatives of the county council for the purposes indicated in the letter, and that meeting was held. There follows in the records at Worthing the report of the town clerk upon the interview between the representatives of his committee and the county valuation committee on November 30. The words which are used are of some little importance: "According to the report presented and received, it was agreed that a revision and a consequent increase of many of the assessments at Worthing were necessary in order to bring them within the definition of gross value under the Rating and Valuation Act, 1925." That definition of "gross value," which appears in s. 68 of the Act of 1925, is in the following terms: "'Gross value' means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

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(1) [1900] A. C. 510.

It is manifest, therefore, at the outset that what was being considered by the borough of Worthing was not a suggestion for the making of a new valuation list because of some general consideration, such as a general rise in the annual value of the properties. It was a suggestion for a detailed revision of the current list because of specific incorrectness in the case of a series of individual hereditaments.

That resolution having been arrived at, the appropriate steps were taken, and there followed an effort to arrive at the correct valuation of many premises. Indeed, in order to see with clearness where the errors lay, there was what is called a revaluation of certain classes of premises. The premises which were taken first were shops; and as a result of the examination which was made, there was a series of proposals relating to shops, involving a very considerable increase in the rateable value, those proposals being put forward in the name of the Council of the borough of Worthing.

Then there followed an examination of the assessments of houses and flats, and certain investigations were made. Afterwards, as a result of those investigations, which disclosed not the need for the application of a new principle, nor anything whatever of a general or universal kind, but only the need for particular corrections in the case of many individual hereditaments, matters came before the assessment committee, proposals were made, and in a great many cases there was a revision of the list. In those circumstances, it is said that there was, in the decisions which were made by the assessment committee, an excess of jurisdiction or usurpation of jurisdiction, because in various respects the Act of 1925 had not been complied with.

It is first of all alleged—and it is the first ground of the rule—that no such proposal as is here being dealt with for the amendment of a valuation list could lawfully be made under s. 37 of the statute. [His Lordship read the material parts of s. 37, sub-ss. 1, 3, and 7.]

The real pith of the criticism directed against what is done is the proposition that under the pretext or form of making individual corrections in an existing valuation list, the authorities referred to in this rule in fact contrived, contrary to the provisions of the Act, to produce a new valuation list within the quinquennium.

Great stress has been laid upon the decision of the House of Lords in *Camberwell Assessment Committee* v. *Ellis.* (1) But I cannot help thinking that that decision, when it is carefully considered, renders no support to the argument which has been founded upon it. What was being dealt with there, in the year 1900, long before the passing of the Rating and Valuation Act, 1925, and long before the creation of county valuation committees, was the Valuation (Metropolis) Act, 1869, which, so far as the rating of the Metropolis was concerned, undoubtedly contained special and rigorous provisions. What *Camberwell Assessment Committee* v. *Ellis* (1) decided was that on the provisions of the Valuation (Metropolis) Act, 1869, in order to justify an alteration of the quinquennial

(1) [1900] A. C. 510, 520.

valuation of a hereditament by a supplemental or provisional valuation list, the persons who sought to alter the assessment had to prove not only that there had been an alteration in the annual value of the hereditament, but also that the cause of that alteration was one directly affecting the assessable value of that particular hereditament. That conclusion was founded upon the specific provisions, and indeed the precise vocabulary, of the Valuation (Metropolis) Act, 1869. It is to be observed that Lord Halsbury L.C., having carefully examined the relevant provisions of the statute, and having shown that it was not enough, for example, to allege a general rise of the annual value of a particular class of property, says (1): "I will only say that in giving judgment in this case I am simply endeavouring to give judgment upon these facts alone. I lay down no general proposition of law beyond this—that the statute has to be construed in each case and applied to the circumstances of each case. It appears to me that anything more dangerous, even if it were possible, than to lay down exactly where you are to draw the line it would be difficult to conceive." Mutatis mutandis, those words, if I may respectfully say so, seem to me eminently applicable to the present case. We are dealing with a different statute, we are dealing with different circumstances, and it is necessary to construe this statute and apply it to the circumstances of this case. A little later, Lord Robertson added these words: "The general scheme of the Act is that the valuation is to stand for five years, irrespective of fluctuations of general value which may occur during that period. But the Legislature also deals with the case of individual hereditaments, the value of which happens to have been altered, not by general economic or social change, but by change in their own individual conditions affecting value." In my opinion, it is quite clear that the subject-matter which was there being dealt with, and dealt with under a different statute, was not only not like, but was wholly different from the subject-matter of the present case. Nobody here suggests that the causa causans of the action complained of was, or was believed to be, a fluctuation of general value occurring after the bringing into force of the valuation list. Nobody suggests that the individual hereditaments here referred to were being reconsidered because it was said that the value had been altered by general economic or social change. The topic of change, and of value affected by the occurrence of change, is not even approached in the present case. What is said here is that, rebus sic stantibus, the valuation list discloses a series of instances where there has been an incorrect assessment of the value of the particular hereditament at the time referred to, not that something either of a particular or of a general nature has since happened which makes it necessary or desirable to revise the former valuation. That seems to be a difference not merely of degree, but of kind. Although, of course, all the general observations contained in the judgments to which our attention has been directed have their proper force and effect, the decision in that case seems to me to help us very little in the decision of the present case.

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(1) [1900] A. C. 510, 520.

It is perfectly true, as Mr. Trustram Eve has very properly reiterated, that the provisions of s. 37 relating to incorrectness, and giving to various persons large powers to deal with incorrectness in a current valuation list, are to be found in a statute which has already provided for the making of, and the operation of, a new valuation list. That, of course, is obvious; but I cannot follow the conclusion which is suggested, that because in this statute you find in s. 19 provisions relating to the making and operation of a new valuation list, therefore the plain meaning of s. 37 must be cut down. It seems to me, if I may say so, with all due respect to the able argument we have heard, that those two sections can perfectly well live side by side, and that what has been done here comes within them. First of all, s. 19 provides that a new valuation list shall be made to come into force on a day named, then that a second valuation list shall be made to come into force on the first day of April in another year, and thereafter a new valuation list shall be made from time to time, so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force shall be a period of five years. But in the very same statute you find the remedial provisions of s. 37, whereby any person, including this newly contrived body, the county valuation committee, and any local authority who is aggrieved by the incorrectness of any matter in the valuation list for the time being in force, may make a proposal, and when that proposal has been made it must be determined by the assessment committee.

The argument against this group of proposals has at various moments taken to itself different forms. At one moment it seems to be said that there were a great many of these proposals. There were, indeed. But to return again to the affidavit of the town clerk, there is great force in his remark that it is the duty of the Council, as rating authority, and its right as ratepayer, to secure uniformity and correct valuation of all classes of hereditaments throughout the borough, and that in the prosecution of that duty, or of that right, it is immaterial whether it is necessary to make proposals in respect of a few or many or all of the hereditaments in the borough.

Next it is said, not only are these proposals many in number, but in kind they are of such a nature as to involve, taken all together, the creation of a new valuation list. But why? To repeat what I indicated a moment ago, nowhere is it suggested that something had happened to increase the gross value of any of these hereditaments. Nowhere is it suggested that some general and comprehensive principle should now be applied. All that is said is that when one looks at the facts it appears that the gross value for the purposes of the Rating and Valuation Act, 1925, has been incorrectly ascertained and stated. That is not a question of far-reaching principle. It is a question of precise, specific and particular detail. It seems to me that to revise the errors traceable to that source is removed by the whole width of the heavens from the making of a new valuation list, a process which, if it were undertaken, would require the fulfilment of the very particular provisions enacted by the statute.

Taking the view, then, that what was here done was not in truth, any more than in form, the making of a new valuation list, or a circuitous attempt to prevent the current valuation list from persisting for the appropriate course of five years, I think that there is no ground for the first of these allegations —that a proposal of this nature for the amendment of the list could not lawfully be made. In my opinion, having considered the facts and arguments in this case, it appears to me that here the provisions of s. 37 were duly complied with.

The second ground is really a restatement in slightly different terms of the first ground. It is said that s. 37 of the Act of 1925 did not empower the rating authority to make a general revaluation of their district, to take effect during the currency of the quinquennial valuation list. That proposition is of the nature of a petitio principii. The rating authority was not engaged upon any such enterprise as the making of a general revaluation to take effect during the currency of the quinquennial valuation list. What was being done in the matter of revaluation was to ascertain what the true gross value of the groups of hereditaments was, in order that with all due promptitude there might be a correction of detailed errors which had been made. I am not in the least attracted by the argument, from the ratepayers' point of view, of the possible utility of error, or the importance of prolonging its life. If errors be made it is desirable, if it be possible, that they should be speedily corrected. Nor am I in the least alarmed by the suggestion that if this course can be taken, there might be an infinite series of fussy interferences and needless revisions, year in and year out, at the hands of unwise and foolish authorities. I am not aware that such authorities exist, and I am not going to assume that any authority, corporation, or assessment committee, rating authority, or county valuation committee, is intentionally going to seek to apply the provisions of this Act otherwise than in the spirit and for the purposes of the Act. That second ground, therefore, seems to me to be a restatement of the first, and to be subject to the same observations.

Finally, it is said that in any event the rating authority could not be "aggrieved" within the meaning of s. 37 of the Rating and Valuation Act, 1925. The rating authority in the present case is the Corporation of Worthing, in whose name these proposals were originally put forward. That local authority is, under the Act of 1925, a rating authority. "Local authority" in s. 37 and elsewhere means "any body having power to levy a rate or to issue a precept to a rating authority." There are various observations to be made upon this ground specified in the rule. It is well to observe that in this beneficial s. 37 by sub-s. 3 it is provided: "The rating authority shall within seven days after the date on which the proposal is made by or served on them, transmit a copy thereof. . . . ." It is clearly contemplated that the proposal there being dealt with may be a proposal not served upon the rating authority, but made by the rating authority. But when the proposal is made, the whole matter is still in process of being developed. The proposal does not mature into an obligation on the ratepayer until the assessment committee has approved. I see no difficulty in taking the view that the rating authority which makes the proposal, or the county valuation committee itself, might be aggrieved by the formal ratification of that which in its inception was merely a proposal. I do not find any support in the case to which reference has been made, of *The King* v. *South-Eastern Essex Assessment Committee. Ex parte Patterson* (1), for the proposition that a rating authority in such circumstances cannot be a person aggrieved. Rather I think it tends the other way. I feel no doubt that in the circumstances of this case, and in view of the provisions of this Act, it was quite open to this rating authority to appear as, and to be treated as, a person aggrieved within the meaning of the section.

In my opinion, on a fair view of what has happened here, notwithstanding the number of hereditaments which within one period have been dealt with, it is wrong to say that there has been an attempt, successful or not, to make a new valuation list. There has been undoubtedly on a large scale a correction of a former incorrectness, but, I think, in the

(1) 153 L. T. 152.

circumstances, and for the reasons, contemplated by this statute. I see nowhere any sign of excess or usurpation of jurisdiction. I think, therefore, that this rule ought to be discharged.

HUMPHREYS J. I agree that the rule ought to be discharged, and as I also agree with the reasons for that decision which appear from the judgment of my Lord, there is nothing which I can usefully add.

SINGLETON J. I agree, and in view of the judgment of my Lord, I wish to add only a few words. The object of all rating is to secure uniformity. That is shown by an examination of the Union Assessment Act, 1862. The principle is extended by the Rating and Valuation Act, 1925, the title of which includes the words "to promote uniformity."

Sect. 18 of the Act of 1925 establishes a new body, called the county valuation committee, and it is clear from sub-ss. 2 and 3 of that section that the purpose of the setting up of the county valuation committee is to promote uniformity in the principles and practice of valuation. The same object is shown in the constitution of the central valuation committee by s. 57 of the Act. Sect. 19 deals with the making of the first and subsequent valuation lists, and provides: "And thereafter new valuation lists shall be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force shall be a period of five years." There thus came into existence quinquennial valuation lists for the whole of the country. Sect. 37 of the Act deals with "revision of current lists." A right to make a proposal for the amendment of the list is given to "any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force." By sub-s. 7 of that section the assessment committee must hear and determine any proposal as if it were an objection to the list.

In the present case the county valuation committee formed the view that a great number of assessments within the area of the Worthing rating authority were wrong, in that they were too low, and consequently were unfair and incorrect. In those circumstances it was their duty, under s. 18, sub-s. 2, to take such steps as they thought fit to promote uniformity in the practice of valuation, and to assist the rating authority. They took those steps. They held a meeting with the rating authority, and they allowed the rating authority the help and advice of the county valuation officer. The rating authority adopted the view of the county valuation committee, after full examination, and after having valuations made. Nothing is said against their good faith. They might have taken a different view, but they saw that a great number of the values in the valuation list were too low, and they sought to have them put right. They adopted the procedure laid down by s. 37 of the Act. If the proposals had been the proposals of the county valuation committee I do not see that any objection could have been taken. Certain duties are put upon the county valuation committee by the statute, and if it had become necessary for them to lodge proposals in order to promote uniformity they would clearly have been within their rights. That applies whether it was one proposal or many thousands of proposals, so long as they were taking such steps as they thought fit for promoting uniformity in the principles and practice of valuation.

That, I think, is sufficient to dispose of this case, for the issue of the writ is discretionary, and clearly the Court ought not lightly to interfere merely on the ground that the proposal was made by the wrong party, if the correct result has been obtained.

Further, I think that the point that the rating authority could not make a proposal fails. The proposal was in fact in the name of the local authority, and the local authority as a ratepayer itself might be aggrieved within s. 37. In saying this I do not intend to say anything which might be construed as meaning that the rating authority as a rating authority cannot make a proposal for the amendment of the list. The right given by s. 37 is in general terms, and it is to any person "who is aggrieved by the incorrectness or unfairness of any matter in the valuation list." The provision is quite different from that which has been referred to in the Valuation (Metropolis) Act, 1869, s. 47.

The argument that what took place was the making of a new valuation within the quinquennial period fails on the facts. No new list was made, but a very large number of amendments was made to the current list. If something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and in particular to s. 19, but that did not take place. There is no need to consider such a case unless and until it arises, and it may then turn out really to be a question of fact. No doubt assessment committees in general will not encourage wide departures from the system of quinquennial valuation. It is always open to an objector, on the hearing of a proposal to amend, to point out that there has been no change, and that the rating authority ought not to be allowed to claim a new figure. That is a matter for the assessment committee, whose duty it is in a proper case to determine whether or not there is incorrectness or unfairness.

Mr. Trustram Eve argued further, that s. 37 of the Act cannot be applied unless the assessment has become unfair, in other words that it cannot be used to correct what was wrong in the original valuation list, and he relied on s. 20 of the Act in support of his argument. I find nothing in s. 37 to lead me to take that view. The section is drawn in the widest possible terms. It is not without interest to note that the learned editor of the last edition of Ryde on Rating at p. 670 takes the same view. Having dealt with the position under the Valuation (Metropolis) Act, 1869, he adds: "Outside London there are no such restrictions: any matter which might have been raised either by a ratepayer or by the rating authorities by way of objection to the draft list may be raised by way of a proposal for the amendment of the valuation list for the time being in force." That I think correctly states the position.

[Two other rules, one for certiorari directed to the assessment committee, and one for prohibition directed both to the assessment committee and the rating authority, and dealing with all the other proposals of the rating authority, according as they had or had not already been heard by the assessment committee, were also discharged, Mr. Trustram Eve intimating that in view of the decision on the first rule he could not argue the others.]

Rules discharged.

Solicitors for the assessment committee: *Waller, Neale & Houlston, for Marsh & Ferriman, Worthing.*

Solicitors for the rating authority: *Sharpe, Pritchard & Co., for J. Kennedy Allerton, Town Clerk, Worthing.*

Solicitors supporting the rule: *Boxall & Boxall, for Edwin Boxall & Kempe, Brighton.*

J. W. H.

Approved. Amal. Anthracite Collieries, Ltd. *v.* Wilds. [1948] 2 All E.R. 252.

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Workmen's Compensation—Accident—Total Incapacity—During total incapacity of workman from accident certificate that he was suffering from miners' nystagmus—Claim to compensation in respect of total incapacity from nystagmus—No right to further compensation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43.

A workman, while totally incapacitated as the result of an accident arising out of and in the course of his employment, was certified by the certifying surgeon to be suffering from miners' nystagmus and disabled from earning full wages, the date of the certificate being under s. 43 of the Workmen's Compensation Act, 1925, the date of the disablement. In proceedings brought by the workman for compensation for total incapacity from the miners' nystagmus while in receipt of compensation for the total incapacity resulting from the accident:—

Held, that the workman was not entitled to any compensation in respect of the nystagmus while the total incapacity from the previous accident continued, as the disease did not result in any loss or diminution of earning capacity; but that a declaration of liability should be made so as to enable the workman to obtain compensation in respect of the nystagmus as soon as the total incapacity from the previous accident ceased.

Thompson v. *London & North Eastern Ry. Co.* [1935] 2 K. B. 90 distinguished.

Appeal from the award of his Honour Judge Richardson sitting in the Durham County Court as arbitrator under the Workmen's Compensation Act, 1925.

The applicant, Joseph Wheatley, was a hewer in the respondents' collieries, and in January, 1935, he met with an accident arising out of and in the course of his employment which resulted in an injury to his spine which totally incapacitated him. The employers paid him compensation at the full rate of 30*s*. a week until July 8, 1935, when he was able to resume work. He remained at work until September 21, 1936, when he again became totally incapacitated by reason of the same injury and the payment of 30*s*. a week compensation was resumed as from that date.

On October 3, 1936, while he was still totally incapacitated from the spinal injury, the certifying surgeon certified under

s. 43 of the Workmen's Compensation Act, 1925, that the workman was suffering from miners' nystagmus and disabled from earning full wages thereby, and as no date was specified as the date of the commencement of the disablement it must be taken to be the date of the certificate. The employers appealed to the Medical Referee, who dismissed the appeal. His finding dated October 26, 1936, was as follows: "I dismiss the appeal of Lambton, Hetton and Joicey Collieries, Ld., against the certificate of disablement given to Joseph Wheatley on the 3rd day of October, 1936, and I hereby certify that the present condition of the workman, as ascertained by my examination, is as follows: He is suffering from miners' nystagmus with oscillation of the eyes when erect or stooping, and is thereby disabled from earning full wages at the work at which he was employed. He is at present unfit to do any kind of work."

In these circumstances the workman, although already in receipt of 30*s.* a week compensation in respect of his spinal injury, brought these proceedings claiming compensation in respect of miners' nystagmus on the footing of total incapacity. Since the workman returned to work on July 8, 1935, he had earned less than before owing to his being given a less favourable position in the mine, and the claim was for 24*s.* a week, being the compensation payable during total incapacity.

The county court judge said that the certificate of nystagmus was by s. 43, sub-s. 2, of the Workmen's Compensation Act, 1925, the date of the notional accident. Whilst it was true that under s. 9, sub-s. 1 (*c*), of the Act the weekly payment was in no case to exceed 30*s.*, that means, as decided in *Thompson* v. *London & North Eastern Ry. Co.* (1), that the claim for each particular accident was limited to 30*s.* a week and did not limit the total amount of compensation to which a workman might be entitled. The present case was, however, distinguishable. That was the case of a man working for a lower wage plus compensation for partial incapacity and meeting with a second accident that totally incapacitated him. Here the second accident as fixed by the certificate

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took place when the workman was already totally incapacitated, although of course the nystagmus must have been present when the man was working in the pit. The question was whether the workman was entitled to receive compensation in respect of his total incapacity from the first accident and in respect of his total incapacity from nystagmus.

When the certificate was granted on October 3, the workman had no earning capacity at all. He was already totally incapacitated as the result of his spinal injury due to the first accident. He was then earning no wages and so suffered no loss or diminution of his wage-earning capacity at that time by reason of the nystagmus.

It seemed to him that whilst a workman was totally disabled by an accident arising out of and in the course of his employment, no other subsequent accidents could increase that disability. Total disability, short of death, was the maximum disability possible, and nothing could be added to totality. The workman was certified to be suffering from a disease which entitled him to compensation on the basis of total disablement. But he had then no wage-earning capacity and suffered no loss in that respect. The case would have been different if he had been laid up with nystagmus whilst working with an admitted reduced wage-earning capacity as the result of a prior accident. That would have been *Thompson's* case (1) over again. But surely you could not add anything to totality.

He thought compensation for "total incapacity" was a final maximum. There was nothing in *Thompson's* case (1) inconsistent with this view, and it seemed to him to be the proper interpretation of s. 9 of the Act. If the applicant should recover from his spinal injury, and cease to be totally incapacitated from this injury, whilst remaining incapacitated from nystagmus, he would then be entitled to compensation in respect of the incapacity from nystagmus. There must therefore be a declaration of liability.

The workman appealed. The appeal was heard on April 29 and May 3 and 4, 1937.

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Hon. Sir Stafford Cripps K.C. and *J. Alun Pugh* for the appellant. The workman is entitled to compensation in respect of the industrial disease independently of the fact that he is receiving compensation at the maximum rate in respect of total incapacity from accident. The first question is, what is the date of the second accident, as the industrial disease is treated as being under the Workmen's Compensation Act, 1925? In other words, at what date has the workman to be considered as totally incapacitated from the industrial disease? Under s. 43 of the Act the injury is treated as commencing during the twelve months before the date of the certificate. The date of the certificate cannot thus be taken for all purposes as the date of the accident: *Richards* v. *Goskar.* (1) Therefore the mere fact that the workman was already disabled from another cause on the date of the certificate does not affect the right to recover compensation. The view of the county court judge, that as the workman had already been incapacitated before October 3, 1936, he could not obtain compensation in respect of the nystagmus, is contrary to this authority. There is nothing in either s. 9 or s. 43 to take away the workman's right to compensation in respect of the nystagmus. In *Thompson* v. *London & North Eastern Ry. Co.* (2) it was argued that the totality of what the workman might recover was limited to 30*s.* a week, but it was held that the workman, having first been given compensation for partial incapacity, could also obtain compensation in respect of a second accident causing total incapacity calculated by reference to the loss of his earning capacity when partially incapacitated. In considering whether compensation is payable in respect of the nystagmus the Court is not concerned with whether there is another accident which is affecting the workman at the time. Sect. 9 of the Act is only concerned with the compensation in respect of the particular accident which is the subject of the particular arbitration proceedings.

[ROMER L.J. May it not be said here that the miners' nystagmus did not disable the man, because he was already totally incapacitated?]

(1) [1937] A. C. 304. (2) [1935] 2 K. B. 90.

The county court judge found the contrary as a fact. Suppose the workman at any moment recovered from the spinal injury the circumstances in regard to nystagmus would be unaltered and yet he would certainly be entitled to compensation.

[SIR WILFRID GREENE M.R. If a miner met with an accident at the coal face from which he was totally incapacitated and on his way back to pithead met with another accident, could he be said to be incapacitated by both the accidents?]

If there are two accidents the Court must consider the right to compensation in respect of each accident independently. Both accidents have caused total incapacity, and there is nothing in the Workmen's Compensation Act to prevent compensation being paid in respect of both accidents. Here the county court judge has made a declaration of liability in respect of the miners' nystagmus, but such a declaration ought only to be made when the workman has recovered and is fit for work: *McCann* v. *Scottish Co-operative Laundry Association, Ld.* (1) It cannot be said here that the miners' nystagmus attacked a man who was already totally incapacitated, because it may have attacked him at any time in the twelve months before the certificate at a time when the man was at work.

[SIR WILFRID GREENE M.R. The injury in the case of an industrial disease consists of the contracting of the disease and the workman's disablement therefrom.]

If the disease was contracted while the man was at work his subsequent incapacity while already totally incapacitated from the spinal injury cannot merge the two injuries.

Sir Walter Monckton K.C. and *J. Charlesworth* for the employers. Compensation is given under the Workmen's Compensation Act for loss of earning capacity. *Thompson's* case (2) decided that after an accident to a workman causing partial incapacity, compensation may be awarded in respect of a second accident causing the loss of the man's reduced earning capacity. When, however, the first accident has totally incapacitated a work-

(1) [1936] W. N. 99; 29 B. W. C. C. 1. (2) [1935] 2 K. B. 90.

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man he can suffer no loss of earning capacity as the result of a second accident while the original total incapacity continues. The county court judge was right therefore to make a declaration of liability only. Under s. 43 of the Act the certificate of the certifying surgeon fixes the date of disablement, which is deemed to be the date of the accident. Until disablement the earlier stages of the disease are merely a potential injury. There is good reason for making a declaration of liability in such a case as this, as there is until the man recovers from the spinal injury no incapacity from the disease: *King* v. *Port of London Authority.* (1)

J. Alun Pugh in reply. There is no ground for isolating the incapacity and attributing it to the spinal injuries exclusively: see *M'Nally* v. *Furness Withy & Co.* (2) and *Harwood* v. *Wykan Colliery Co.* (3) The case that arises here could hardly happen apart from an industrial disease, because when the second accident happened there would be no pre-accident wages. Here that difficulty does not arise. The workman has fulfilled all the conditions necessary to entitle him to compensation in respect of the miners' nystagmus. Nor can it be said that in granting a certificate the certifying surgeon has done anything outside his jurisdiction.

SIR WILFRID GREENE M.R. [after stating the facts:] The claim, it is to be observed, is a claim for compensation in respect of two total disablements, which were referred to in the course of the argument as "concurrent." The claim possesses upon its face the quality of courage, and if it be right leads, I think, necessarily, to this position, that a workman totally disabled through one injury, may nevertheless be entitled to receive in respect of a different injury, or one or more different injuries, compensation on the footing of total disablement; with the result that he would be receiving, or might be receiving, two or three or four sets of compensation, each based on the footing that the particular

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(1) [1920] A. C. 1.
(2) (1913) 6 B. W. C. C. 664.
(3) [1913] 2 K. B. 158.

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injury to which the particular compensation related had the effect of preventing him from earning his wages. It would result also in this, that the Workmen's Compensation Act with regard to such matters would give a solatium for misfortune rather than compensation for loss of earning capacity. But if the Act on its true construction so provided, of course, it would be necessary to give effect to it.

I will first look at the relevant provisions of the Act in order to see whether, when properly read, they afford a basis for this claim. Sect. 1, sub-s. 1, of the Act, which lays down its guiding object, provides as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained." The provisions in the case of total or partial incapacity are to be found in s. 9, sub-s. 1, which provides as follows: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained." Pausing there for a moment, I observe that in order to qualify the injured workman for compensation, "total or partial incapacity for work" must result from the injury: a provision which I myself should have understood without any difficulty as meaning that it must be shown that the effect or the result of the injury is to deprive the workman of a capacity for work which he previously enjoyed. That previous capacity might, of course, be a total capacity or a partial capacity. If he was a man in good health, without injury, his capacity would be what I may conveniently call 100 per cent. On the other hand, if he was in ill-health, or was injured, his capacity might be less—it might be a 60 per cent. capacity. Nevertheless, if the result of the injury is to destroy or diminish the capacity which he has, whether it be 100 per cent. or 60 per cent., then he becomes entitled to compensation. The basic requirement of the section, as I read it, is that before compensation is claimed, there must be a diminution of or a destruction of a workman's existing capacity for work, with, of course, consequential incapacity to earn the wages which until then, whatever his condition was, he was capable of earning.

In applying that construction to the case of injury by accident, in the ordinary sense, no particular difficulties are presented. The task of fitting into the scheme of this Act a different class of disablement, namely that due to industrial disease, is rather more complicated, and for the quite obvious reason that in the case of an industrial disease which is progressive in its effect, the date of its commencement may very well be uncertain: and it may in its earlier stages not prevent a man from working, even if its existence is known.

That was a state of things which had to be fitted into the scheme of the Act by appropriate language and appropriate machinery. The way in which that is done is laid down in s. 43. Taking the relevant words of the section, s. 43, sub-s. 1, provides: "Where—(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act"—and that includes miners' nystagmus—"and is thereby disabled from earning full wages at the work at which he was employed; . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . . , whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(*a*) The disablement . . . . shall be treated as the happening of the accident." I need not read what follows. It is to be observed with regard to that section that in order that the case of industrial disease may be brought into line with the case of personal injury by accident in the ordinary sense, it is necessary that there should be two elements present—

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the presence of the disease and the consequential disablement.

I may here refer to one sentence in the speech of Lord Tomlin in *French* v. *Archibald Russell, Ld.* (1), where Lord Tomlin says: "I think it follows that in cases of industrial disease the injury by accident is not the contraction of the disease simpliciter, but the contraction of the disease plus the consequent disablement or suspension as the case may be." Therefore, in what I may call the first onset of an industrial disease, the injury by accident is not present through the mere contraction of the disease. The two factors must be combined, the presence of the disease and the consequential disablement.

There is a third matter of importance to remember under s. 43. The proof of the two essential matters, the presence of the disease and the disablement, consists in the first instance of the certificate of the certifying surgeon: and in cases where the matter has been taken to a medical referee, it consists of the decision of the referee, which is conclusive with regard to all matters falling within his competence under the section. The language, as I have said, has this effect. Given the presence of the necessary elements, the disease is to be treated as if it were "a personal injury by accident arising out of and in the course of that employment." I do not read that provision as meaning that the mere presence of those matters, unaccompanied by any disability in fact due to the disease, is sufficient to entitle the workman to compensation, because the governing condition of an award of compensation, namely, that there should be total or partial incapacity for work resulting from the injury, must be satisfied. Unless it is possible in any particular case to say that total or partial incapacity for work results from an injury or what, in the case of an industrial disease, may be called a notional injury in view of the language of s. 43, the right to compensation does not in my opinion arise. The section provides, as I have said, that the disablement or suspension shall be treated as the happening of the accident. It is also provided that in the absence of any particular date mentioned in the certificate or the report of the medical referee, the date of the certificate is to be the date when the disablement commenced. That provision is contained in sub-s. 2 of s. 43: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—(*a*) where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine." That proviso, of course, has no relevance to the present case; but, taking the language of the section as it appears to fall for construction, it would appear in the present case, that as the date of the certifying surgeon's certificate is October 3, and he did not certify any date for the commencement of the disablement, October 3 is to be taken as the date of disablement; and, accordingly, the disablement which is to be treated as the happening of the accident must be dated as at October 3, 1936. As I say, that is what I should have thought myself was the effect of the section.

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(1) (1934) 27 B. W. C. C. 338, 346.

The position here is that as from September 21, 1936, this workman was in fact totally incapacitated. He was suffering as a result of his spinal injury from a total incapacity for work: and he was in receipt of appropriate compensation on that basis. On October 3 the second accident happened to him, and that accident consisted of the onset of the disease called miners' nystagmus, coupled with the disablement certified in the certificate. But at the date of the certificate, as he was already totally incapacitated for work, he had no element of capacity left in him which this new supervening accident could take away.

It is said nevertheless, that, although there was no element of capacity of which the man was deprived, the language of the Act is imperative, and that the existing incapacity due to spinal injury must, for the purposes of this case, be totally disregarded, and treated as though it had never occurred.

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The argument in respect to that matter really fails under two heads, if I have followed it rightly. First of all, it is said that the language of s. 43 imperatively directs that whenever the certificate is given that conclusively shows that the man is entitled to compensation, on the footing that he is totally incapacitated from his work by the injury—namely, the disease plus the disablement. It is said that the effect of this may very well be to create two concurrent disablements in respect to each of which the man is entitled to his compensation. Reliance is placed in that connection upon the case in this Court of *Thompson* v. *London & North Eastern Ry. Co.* (1)

It appears to me, however, that the answer to that argument is really to be found in the true construction of s. 43. When the certifying surgeon is called upon to exercise his powers under the Act, he can only effectively do what the section entitles him to do. Under the section he is concerned with one thing, and one thing only. He has no jurisdiction under the section to certify with regard to matters which fall outside that one thing. That one thing is the presence or absence of an industrial disease of such a character as to disable the man from earning full wages. The certifying surgeon has nothing to do with the state of the man's health, or his situation in other respects. His function is to certify the presence of the disease, and the quality of the disease as a disease. Is it a disabling disease? That is the question that is put to him: and that is the only question that he has to answer. If he or the medical referee were to deal with matters outside that, they would be dealing with matters which certainly would not fall within the language of s. 43, sub-s. 1. It is true that the medical referee by sub-cl. (*f*) is to "certify as to the condition of the workman," and it may be that under that language he would be entitled to go into outside matters; but there is much to be said for the view that the words "the condition of the workman" mean his condition in relation to the particular disease which is in question. But however that may be, when the certifying surgeon certifies and the medical referee decides that the man is suffering

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from disease, and is thereby disabled, in my opinion they are dealing, and dealing only, with the particular nature and the particular severity of the disease, considered in connection with the earning capacity of the man. They are not concerned with the question whether, owing to the presence of something else, the man is already suffering from a total incapacity for work. It seems to me that that is the proper way to read s. 43 and give it its appropriate effect, when read in conjunction with s. 9. I am quite unable in this case to accept the view that the certification by the certifying surgeon and the decision of the medical referee to the effect that the man was suffering from disease, and thereby disabled, have or are intended by the section to have the meaning that total or partial incapacity for work results from the injury. The language used, it is to be observed, is different ; and it appears to me that the certificate taken by itself does not dispose of the matter ; and that it is legitimate to inquire whether, on the facts of the case, the man has been deprived, by reason of this statutory accident, of some already existing capacity.

That appears to me to be the only view consistent with the language and scope of the Act. But it is said that *Thompson* v. *London & North Eastern Ry. Co.* (1) in some way assists the argument. It is only necessary to examine that decision quite shortly in order to see that it really does not touch the matter now in question. That was a case where a workman, having suffered a particular accident, as a result of which he became partially incapacitated, was put to do work suitable to his injured condition at which he continued for some time, but in which he suffered another accident, the result of which was total incapacity. It is to be observed in that case that the man received compensation for his partial incapacity, and went back to work as a partially incapacitated man ; but a man nevertheless who retained that percentage of capacity permitted by his physical condition. If that remaining percentage of capacity was taken away from him as a result of another accident, under the clear language of the Act he became entitled to compensation

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for being so deprived of that percentage of capacity. It was held by this Court that in the first place he was entitled not merely to his compensation for the partial incapacity, which was a partial incapacity which affected a previously sound man, but also to compensation for the supervening incapacity which affected him as a partially sound man. The real question which fell to be decided in that case was whether or not, in such a case, the limit of 30*s.* imposed by the Act operated so that the compensation payable to the man in respect of those two incapacities ought to be limited to 30*s.* It was held by this Court on the true construction of the Act, that that was not the result, and that the man was entitled to his full compensation in respect of each injury. I cannot see how that case affects the present one. To begin with, this is not a case where a man suffering from partial incapacity has his remaining capacity removed by nystagmus. If this were a case where the man's spinal injury was such as to reduce him into a lower category of capacity, and he continued to work as a partially incapacitated man, but miners' nystagmus supervened, the case would be very like the case of *Thompson* v. *London & North Eastern Ry. Co.* (1) It would be a case of a man already partially incapacitated being deprived of his remaining capacity by a fresh accident. But that is not the case here. The learned county court judge has used in his judgment a very useful expression in saying: "You cannot add to totality." I would add to that another way of looking at it—namely, that you cannot subtract from nothing. If you have an existing total incapacity, there is no element of capacity which can be taken away. That appears to me really to be the short answer to the main argument in this case.

There is another argument put forward which I have some little difficulty in following. It is, I think, of this nature. It is said that the Court ought not to take October 3 as the relevant date for the happening of the accident but that the happening of the accident must be put forward to some earlier date, which is to be fixed during the period when the man was back at work, after he had temporarily recovered from the original spinal injury. It is said that it is quite obvious that the miners' nystagmus must have been contracted at some time during that period. If that were so, I suppose the result would be something of this kind. First of all there would be the original spinal incapacity due to the spinal injury which had been temporarily cured, the injury remaining, so to speak, dormant, with the result that subsequent incapacity from the same cause would entitle the man to resumption of compensation. During that dormant period there might be a fresh accident, the effect of which would be to cause total incapacity. The third stage would be the reawakening of the dormant injury to the spine. It is to that position that the present argument wishes to steer the case, the idea, no doubt, being that, if the sequence of events could be put in that order, it would be possible to make a claim both for the incapacity due to the original injury and for the incapacity due to miners' nystagmus. I need not consider what the effect would be, if that were the order of events. It is sufficient for me to say that on the facts of this case the case appears to me to be quite different from that which I have been envisaging, because I am quite unable to see that the Court is entitled to throw back the date of the injury for this purpose to some date earlier than October 3.

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(1) [1935] 2 K. B. 90.

As Lord Tomlin said, it is to be remembered that the injury consists of the two elements of disease and disability. It is only when those two elements are both present that injury by accident is to be deemed to have occurred. It is important in this connection to bear in mind the principle underlying a class of case where a man suffering from industrial disease, which totally incapacitates him temporarily, recovers from that disease so that he can go back to work; and then, owing to the recurrence of the disease, is again disabled. In that class of case, as soon as the first disability occurs, the injury is complete. When the man is able to resume his work, the effect, as I understand the authorities, is merely that the original disease may be still present and the man

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not completely cured, although the element of incapacity has for the moment disappeared. But if a new incapacity or a new disablement supervenes, which attaches itself, so to speak, to the dormant disease, that is to be treated as a recrudescence of that disease due to the original accident. That is perfectly comprehensible and a perfectly logical conception. But cases of that kind in my judgment afford no authority for giving to a disease the beginning of which is referable to some unknown date, the potential quality of accident, before it is coupled with the supervening disablement. What I mean by this is that where a man has suffered the injury of disease plus disablement, the removal of the disablement does not mean that he is cured from the disease. On the other hand, where a man has not suffered from disablement due to disease until a particular date, it is not legitimate for any relevant purpose to treat him as though he had at some date prior to that been suffering from the disease.

It is said that the case of *Richards* v. *Goskar* (1) affords some foundation for this argument. In my opinion that was a case of a totally different character, where the matters falling to be considered were quite different from those which fall to be considered here. The House of Lords was confronted with the task of reconciling certain observations in previous decisions which at first sight had caused difficulty, and appeared to be irreconcilable, but which, after careful examination, were found by the House in that case to be reconcilable. The question in that case (and it is important to remember this) was stated by Lord Atkin thus (2): "The simple question is whether a workman who has been certified to have been disabled by an industrial disease and is found to be still suffering from that disease and to be disabled by that disease, is debarred from recovering compensation because for some time after the original disablement he was able to earn full wages at the employment in respect of which he was originally certified." That case, therefore, was of the class which I have just mentioned, where a man originally

(1) [1937] A. C. 304.

(2) Ibid. 324.

suffering from disease plus disablement, which constituted the injury, subsequently was able to work, and then was again incapacitated by the same disease. It is a class of case differing totally from the present case, because its foundation was the original happening of the accident constituted by the disease plus disablement; and a supervening capacity for work does not destroy the effect of that combination.

It is true that in the reasoning of Lord Atkin, who delivered the leading speech in the House, the provisions of the section are exhaustively considered, and there are observations with regard to the meaning of the provision in s. 43, that the disablement or suspension shall be treated as the happening of the accident. It is said that because Lord Atkin in that case indicated an opinion that that expression must be read subject to some limits, that we must so limit its meaning in this case as to entitle us to speculate as to the date on which the disease first effected its lodgment in the man and to treat that date, which we are to ascertain by some method of inference, as though it was the effective date. I cannot find, either in the reasoning or the decision, or in the observations of Lord Atkin in that case any justification for taking any such view, in such a case as the present; and I am not prepared to take it. In my opinion both the arguments that were put forward are void of foundation. On the particular facts of this case, the employee, so long as he suffers from the total incapacity due to the spinal injury, cannot for the purpose of claiming compensation be treated as incapacitated over again by miners' nystagmus. The learned county court judge in a careful judgment has quite clearly arrived at that conclusion, and I find nothing to quarrel with in his judgment.

The actual order that the learned county court judge made was as follows: "I find that the applicant is and has been since the 3rd October 1936 suffering from the disease of miners' nystagmus, so as to constitute a personal injury by accident within the meaning of section 43 of the Workmen's Compensation Act, 1925, and is thereby disabled from earning full wages at the work at which he was employed, and is at present unfit to do any kind of work; but inasmuch as the evidence has established that at the time of the arbitration the applicant was totally incapacitated for work as a result of injuries caused by accident arising out of and in the course of his employment on the 28th January 1935, and from the 21st September 1936 has been in receipt of compensation at the rate of 1*l.* 10*s.* per week in respect of such injuries, I order that should the applicant recover from the injury sustained on the said 28th January 1935 or cease to be totally or partially incapacitated for work as the result of the said industrial disease, either party shall be at liberty to apply for review in accordance with section 11 of the said Act, and I therefore grant a declaration of liability." It appears to me that the learned county court judge had ample jurisdiction to make that order. Indeed, the order logically follows from the construction which I have put upon the Act. The position of the workman, as it seems to me, is amply safeguarded by the declaration of liability, which will enable him, if and when the circumstances warrant it, to claim the compensation which will be due to him on the footing that he is actually incapacitated for work by reason of miners' nystagmus. And I think that the decision is in accordance with the language of the Act. This appeal must be dismissed with costs.

ROMER L.J. It is provided by s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, that "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained." But it by no means follows that because a workman has sustained personal injury by accident arising out of and in the course of his employment, that he thereby becomes entitled to be paid compensation from his employer. It is provided in sub-cl. (*a*) of the sub-section as follows: "The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least three days from earning full wages at the work at which he was employed." That proviso not only protects the employer from paying compensation in cases of injuries that are comparatively trivial, but it also enacts quite clearly to my mind that compensation is not payable unless by reason of the injury the workman is wholly or partly disabled in fact from earning the wages which he was earning at the time of the accident. It is loss or diminution of those wages which gives him the right to compensation. It is the amount of that pecuniary loss or diminution which forms the basis on which the amount of the compensation is calculated under s. 9 of the Act.

In the present case I cannot find that the miner, the workman in this case, was disabled by reason of the nystagmus from earning wages. At the time of the accident, which we must take to be October 3, the workman was not earning any wages at all, because he had been disabled from earning those wages by the earlier accident to which the Master of the Rolls has referred. If and when the workman can say that he is disabled in fact by the nystagmus from earning pre-accident wages, then he will be entitled under the declaration of liability, which in my opinion the learned county court judge quite rightly made, to obtain compensation.

It is true that the medical referee in his certificate has stated that the workman was disabled by nystagmus from earning full wages at the work on which he was employed at the date of the accident. But I agree with the Master of the Rolls that that certificate is no more than, and is intended to be no more than, a certificate as to the present condition of the workman as a result of the disease; and was not intended to be, and could not have been intended to be, a certificate by the medical referee that the workman in fact had been disabled from earning wages. Of that fact the medical referee would have no knowledge at all, or at any rate would not necessarily have any knowledge. In my opinion, the learned county court judge arrived at the right conclusion in this case.

Upon the second point with which the Master of the Rolls

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has dealt, namely, the true date on which the accident from nystagmus must be taken to have occurred, I have nothing to add to what he has said in his judgment, except to say that I entirely agree with every word of it. In my opinion, this appeal fails, and must be dismissed.

SCOTT L.J. The judgment of the Master of the Rolls, supplemented by the observations of Romer L.J., covers the whole field of this appeal so completely, and in my view so perfectly, that I need say nothing further.

Appeal dismissed.

Solicitors: *T. D. Jones & Co., for Ronald W. Williams, Durham; Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

H. C. G.

ROBINSON BROTHERS (BREWERS), LIMITED *v.* ASSESSMENT COMMITTEE FOR THE No. 7 OR HOUGHTON AND CHESTER-LE-STREET AREA OF THE COUNTY OF DURHAM.

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Jan. 20, 21, 22, 25;
March 23.

Rates—Assessment—Rateable value—Licensed premises—Tied house—Competition of brewers occupying by manager—Decision of long standing reversed — Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22, *sub-s.* 1; *s.* 68.

In assessing a licensed public-house to rates, regard should be had to the competition between brewers, each desirous of obtaining a tenancy of the house in order to carry on the business there by means of a manager in his own employment, and thereby to secure the use of the house for the sale of beer from his own brewery, and thus to obtain a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make, and to the rent which a competing brewer who desired the house for these reasons might be willing to give.

Bradford-on-Avon Union v. *White* [1898] 2 Q. B. 630 overruled.

Decision of the Divisional Court [1936] 2 K. B. 283; [1936] W. N. 132, reversed.

The fact that a decision of a Divisional Court given in 1898, in a case relating to the rating of a licensed public-house had been since acted upon by rating authorities throughout the country, noticed without disapproval by several other and higher Courts, and disapproved by no other Court:—

Held, not to preclude the Court of Appeal from overruling it on finding that the decision was erroneous in law.

Observations in *West Ham Union* v. *Edmonton Union* [1908] A. C. 1, 4; and *City of Westminster* v. *Southern Ry. Co.* [1936] A. C. 511, 563, 564, applied.

Appeal from the decision of a Divisional Court upon a case stated by quarter sessions for the county of Durham pursuant to the Rating and Valuation Act, 1925, ss. 31, 32.

Robinson Brothers (Brewers), Ld. (hereinafter called "the company"), were the occupiers of a hereditament named the "White Lion Hotel," Houghton-le-Spring, in the Houghton-le-Spring urban rating area, in the county of Durham.

At and before the date next mentioned the company was assessed in the valuation list then in force under the Rating and Valuation Acts for that rating area as the occupier of the said hereditament at 112*l.* gross value and 90*l.* rateable value.

On December 7, 1934, the company made a proposal to the assessment committee for the No. 7 or Houghton and Chester-le-Street assessment area (hereinafter called " the committee "), pursuant to s. 37 of the Rating and Valuation Act, 1925, for the amendment of the valuation list in respect of that hereditament by reducing the assessment.

On February 4, 1935, the committee, having considered that proposal, decided to make no alteration in the valuation list.

On February 15, 1935, the company gave notice of appeal to quarter sessions against the decision of the committee on the ground that the assessment was excessive in view of the volume of trade.

On April 4, 1935, the appeal was heard by the court of quarter sessions.

In para. 2 of the case it was stated that at the hearing of the appeal the following facts were admitted or proved :—

(*a*) The said hereditament is a fully licensed public-house and has been at all material times occupied by the company and managed by a manager in the employment of the company. All the draught beer sold and some of the bottled beer sold in the said hereditament has at all material times been beer brewed by the company or by its associated company, but considerable quantities of bottled beer brewed by Messrs. Bass and Messrs. Worthington were also sold.

(*b*) A large number of licensed public-houses in the committee's assessment area and elsewhere are occupied by brewers and managed by managers in the employment of such brewers. This practice was uncommon in the case of ordinary public-houses down to the time when the case of *Bradford-on-Avon Union* v. *White* (1) was decided and for some years thereafter. Practically all the public-houses in the said assessment area are owned by brewers and either managed, as in the case of the said hereditament, or sublet to tied tenants.

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(1) [1898] 2 Q. B. 630.

(*c*) A brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make.

(*d*) There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament.

(*e*) If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) hereof might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of 112*l*. Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.

(*f*) If the competition of the brewers is taken into consideration but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (*c*) hereof are excluded from consideration except so far as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by these reasons, the rent at which the said hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of 95*l*.

It was contended on behalf of the company: (i.) that the decision in *Bradford-on-Avon Union* v. *White* (1) was correct and ought to be followed in principle; (ii.) that in estimating

(1) [1898] 2 Q. B. 630.

the gross value of the hereditament the Court ought to exclude from consideration the special prices which brewers might give owing to personal considerations and not on account of the value of the premises, except so far as the possibility of such special prices being obtained raised the market value generally; and (iii.) that the assessment under appeal was excessive and should be reduced.

It was contended on behalf of the committee: (i.) that even on the basis of *Bradford-on-Avon Union* v. *White* (1) the assessment under appeal was not excessive; (ii.) that in estimating the gross value of the hereditament the Court should take into consideration the competition which might reasonably be expected between brewers for a tenancy of the premises from year to year, no matter what might be the motives inducing these brewers to enter into that competition; (iii.) that in estimating the gross value of the hereditament the Court ought to take fully into consideration the rents which brewers might reasonably be expected to pay for it for the reasons stated in sub-para. (*c*) of the case, and that the Court ought not to exclude such rents from consideration in the manner or to the extent referred to in sub-para. (*f*) of the case or at all; (iv.) that the decision in *Bradford-on-Avon Union* v. *White* (1) was wrong and ought not to be followed; and (v.) that the assessment appealed against ought to be confirmed.

The court of quarter sessions gave their decision in these terms: "We were of opinion that we were bound to follow the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1) and accordingly we allowed the appeal and fixed the gross value of the said hereditament at 95*l*. If we had considered that we were not bound by the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1) we should have fixed the gross value of the said hereditament at 112*l*."

The question of law for the High Court was whether the decision of quarter sessions fixing the value of the hereditament at 95*l*. was correct in law, and if not what ought to be done in the premises.

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(1) [1898] 2 Q. B. 630.

The Divisional Court held, affirming the decision of quarter sessions, that in assessing a licensed public-house to rates, the fact that there is a great competition among brewers in the district to obtain the tenancy of such houses in order to carry on the business by managers in their own employment ought not to be excluded from consideration in so far as it shows the existence of such a demand as would raise the market value and thus increase the rent at which the house might reasonably be expected to let from year to year; but that the gross estimated rental ought not to be fixed at the special sum above the market value which a brewer might be willing to give on the consideration personal to himself that he might make large profits by carrying on the business of the house by means of a manager in his own employment. The Court considered itself bound by *Bradford-on-Avon Union* v. *White.* (1)

The assessment committee appealed.

Comyns Carr K.C. and *F. Grant* for the assessment committee, appellants. The Divisional Court were wrong in affirming the decision of quarter sessions that the gross value of the public-house should be fixed at only 95*l.* and not at 112*l.*

The question is what is the "gross value" of the public-house according to the definition of that expression in the Rating and Valuation Act, 1925, s. 68, sub-s. 1—namely, the rent at which the hereditament might reasonably be expected to let from year to year.

The Divisional Court appears to have regarded itself as bound by the case of *Bradford-on-Avon Union* v. *White* (1) to adopt the lower value. That Court was not, however, necessarily bound by that case, but might have distinguished it on the ground that in that case the brewer was seeking to obtain a tenancy of the house for the purpose of sub-letting it to a tied sub-tenant, whereas here he is seeking to obtain it for the purpose of occupying it himself by his own manager.

But even if the *Bradford* case (1) was binding on the Divisional Court, it is not binding on this Court, which has power to examine it and if necessary to overrule it.

(1) [1898] 2 Q. B. 630.

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It was there held that the gross value of the house should be fixed not at the special rent which a brewer might pay on the personal consideration that he might make large profits by using the house for the sale of his own beer, but at a lower figure resulting from the effect of the competition of brewers upon the rent which would otherwise represent the reasonable market value of the house.

It is submitted that that case was wrongly decided and should be overruled.

Its unsatisfactory character may perhaps be accounted for by the unsettled state of the law at the time when it was decided, as shown by two earlier cases—namely, *Allison* v. *Monkwearmouth* (1), where it was held, but only by a majority of the Court, that the occupier of a brewery who under a contract in his lease could compel tied houses to take their beer from the brewery was properly rated on the enhanced value which that advantage gave to the brewery, and *Sunderland Overseers* v. *Sunderland Union* (2), where a contrary conclusion was arrived at, but there also only by a majority of the Court.

One reason why the *Bradford* case (3) is unsound in law is that the judges who decided it had regard to the motive or purpose of the intending tenant. The case is further unsatisfactory because the two judges who decided it took different views as to the motives which should be taken into account, Ridley J. apparently holding that only the competition of brewers intending to occupy the house themselves should be considered and that that of brewers intending to occupy by sub-tenants in order to make commercial profit by sale of their beer should be disregarded, while Channell J. thought that the competition of brewers should be considered, whatever their motive, but only in so far as it tended to raise the general market value of the house.

The *Bradford* case (3) is inconsistent with the principles which have been laid down in other cases. These principles are that in estimating the rateable value of a hereditament

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(1) (1854) 4 El. & Bl. 13.
(2) (1865) 18 C. B. (N. S.) 531.
(3) [1898] 2 Q. B. 630.

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the full amount of the rent which prospective tenants of any particular class would pay for it should be taken into account without regard to the motive which may induce them to pay that rent, and where that motive is an expectation of profit it does not matter whether that profit is earned on the hereditament which is the subject of the tenancy or elsewhere: see *Reg.* v. *London & North Western Ry. Co.* (1); nor, on the other hand, does it matter that, by agreement with the landlord, the tenant in occupation of the hereditament does not himself derive the full benefit from it, the material consideration being what rent could be had for the hereditament as a whole: *Reg.* v. *Rhymney Ry. Co.* (2); *Davies* v. *Seisdon Union* (3); and see *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (4); nor does it even matter that the occupying tenant can make no profits out of the hereditament: *Reg.* v. *School Board for London.* (5)

The *Bradford* case (6) has been discussed in Ryde on Rating, 6th ed., pp. 611–614, where it is stated that it is difficult to be sure of the effect of that case because the quarter sessions there professed not to exclude brewers as competitors, although they fixed the assessment at an amount calculated on the assumption that they were excluded except as occupying tenants; that if they admitted the brewers only as occupying tenants who were not to underlet, then it was difficult to reconcile the decision with the judgment of Channell J.; that that judgment in distinguishing between special prices due to personal considerations affecting the competitors on the one hand and market value on the other, and in regarding the rent as being fixed by the higgling of the market and at the same time estimating the market value by excluding the entire class of competitors who more than any other class made the market, seemed somewhat illogical; and that to inquire into the motive which induced a particular class of tenants to give the rent which they were willing to give seemed to be contrary to authority.

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(1) (1874) L. R. 9 Q. B. 134.
(2) (1869) L. R. 4 Q. B. 276, 283.
(3) [1907] 1 K. B. 630.
(4) [1901] A. C. 175.
(5) (1886) 17 Q. B. D. 738.
(6) [1898] 2 Q. B. 630.

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The *Bradford* case (1) prevents fairness and uniformity in the practice of rating, and on that ground it should be overruled. Ever since it was decided, it has been acted upon by rating authorities with the result that licensed premises for which brewers are competitors have been under-rated and all the other hereditaments in the district have been proportionately overrated.

If the *Bradford* case (1) is wrong in law, the facts that it was decided so far back as 1898, that it has since been acted upon, and that it has been recognized in later cases without express disapproval, are no reasons why it should not be overruled. In many instances cases which have been regarded as authorities for longer periods than that of the *Bradford* case (1) have been overruled. In *Westminster Council* v. *Southern Ry. Co.* (2) the House of Lords overruled *Smith* v. *Lambeth Assessment Committee* (3) on the ground that it was based on an erroneous view of the law, notwithstanding that it was decided fifty-four years before and had since been applied in practice. In *Pontypridd Union* v. *Drew* (4) the Court of Appeal overruled *Birkenhead Union* v. *Brookes* (5), which had been decided twenty-one years earlier. In *London County Council* v. *Erith Churchwardens* (6) Lord Herschell L.C. no doubt said that he deemed it inexpedient to interfere with a long course of practice supported by decisions which are not of very recent date; but, as pointed out by Lord Wright in *Westminster Council* v. *Southern Ry. Co.* (7) the House of Lords has, since that case was decided, on several occasions departed from rules laid down in older cases. It has been suggested that the alleged rule that cases of long standing should not be interfered with applies more especially to rating cases, but in *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee* (8) it was departed from by the House of Lords even in regard to such cases.

[SLESSER L.J. referred to Beale's Cardinal Rules of Legal

(1) [1898] 2 Q. B. 630.
(2) [1936] A. C. 511.
(3) (1882) 10 Q. B. D. 327.
(4) [1927] 1 K. B. 214.
(5) (1906) 95 L. T. 359.
(6) [1893] A. C. 562, 599.
(7) [1936] A. C. 511, 564.
(8) [1911] A. C. 171.

Interpretation, 3rd ed., pp. 16–24, where the question of the authority of long-standing decisions is discussed.

In *West Ham Union* v. *Edmonton Union* (1) the House of Lords overruled *Reg.* v. *Tipton* (*Inhabitants*) (2), which had been regarded as an authority for sixty-five years. In *Hamilton* v. *Baker* (3) the House of Lords overruled *The Mary Ann.* (4) Lord Macnaghten said (5): "I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time." In *Winstanley* v. *North Manchester Overseers* (6) the House of Lords held that a parson who was in beneficial occupation of the burial ground was liable to poor rate in respect of the burial fees received by him for interments therein, although there was no precedent for thus rating a parson in all the years since the Statute of Elizabeth. In *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee* (7) the House of Lords held that sewers were rateable, although previously there had been considered to be a general exemption of all sewers from rateability.

In *Great Western Ry. Co.* v. *Owners of S.S. Mostyn* (8) the House of Lords in dealing with *River Wear Commissioners* v. *Adamson* (9) considered the case where there had been a previous decision of the House which the House subsequently thought was wrong and held that the decision itself should stand but that it should not be extended.

Latter K.C. and *Michael Rowe* for the brewery company,

(1) [1908] A. C. 1.
(2) (1842) 3 Q. B. 215.
(3) (1889) 14 App. Cas. 209.
(4) (1865) L. R. 1 A. & E. 8.
(5) 14 App. Cas. 222.
(6) [1910] A. C. 7.
(7) [1911] A. C. 171.
(8) [1928] A. C. 57.
(9) (1877) 2 App. Cas. 743.

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respondents. The decision of the Divisional Court was right and should be affirmed.

It is agreed that the question is, What is the "gross value" of the public-house as defined by s. 68 of the Act of 1925—namely, the rent at which the hereditament might reasonably be expected to let from year to year, that expression being the statutory equivalent of the older expression "market value." The Divisional Court rightly decided that question in accordance with the case of *Bradford-on-Avon Union* v. *White* (1), which it is submitted is sound in principle. The two judges who decided that case, Ridley and Channell JJ., both arrived at the same conclusion, that the rateable value of the public-house was its market value, as measured by the rent at which it might reasonably be expected to let from year to year, and, as observed by du Parcq J. in the present case, there is no substantial difference between their views. Channell J. there laid it down that in assessing the rateable value of the house the competition of brewers should not be wholly excluded from consideration, but the special prices which they might give owing to personal considerations and not on account of the value of the premises should be excluded except in so far as the possibility of such special prices being obtained raised the market value generally. (2) For the purpose of showing that considerations personal to the tenant should not be looked at, he referred incidentally to *Dodds* v. *South Shields Assessment Committee* (3), which had previously been dealt with in *Cartwright* v. *Sculcoates Union* (4), but it is not material to consider these cases here.

The *Bradford* case (1) has been expressly approved in subsequent cases. The statement of Channell J. (2), to which reference has just been made, was quoted with approval in *Truman, Hanbury, Buxton & Co.* v. *Inland Revenue Commissioners* (5) by Hamilton J., whose judgment was affirmed by the Court of Appeal. In the case of *Alfred Leney & Co.* v. *Whelan* (6), where the question was as to the valuation of a

(1) [1898] 2 Q. B. 630.
(2) Ibid. 639.
(3) [1895] 2 K. B. 133.
(4) [1900] A. C. 150.
(5) [1912] 3 K. B. 377.
(6) [1934] 2 K. B. 511.

public-house for assessment to income tax under the Income Tax Act, 1918, Sch. A, which is closely analogous to assessment to rates, the statement of Channell J. was cited with approval by Lord Hanworth M.R. and was apparently recognized by Romer L.J. also. In the case of *In re Sir William Thomas Paulin* (1), where the shares of a company were subject to restriction on alienation, and the question was as to their value in the "open market" within the meaning of the Finance Act, 1894, s. 7, sub-s. 5, Lord Hanworth M.R. in a dissenting judgment again relied upon that statement of Channell J. (2) and his dissenting opinion was afterwards affirmed by the House of Lords. (3)

The *Bradford* case (4) has never been disapproved in any other case.

It is true that the *Bradford* case (4) has been adversely criticized in Ryde on Rating, 6th ed., pp. 611–614, but the views there expressed are only those of an eminent text-writer. Moreover, these views appear to depend upon erroneous inferences from the value of the premises there arrived at. The figure there taken did not exclude the competition of the brewers altogether, nor did it include matters which did not affect the value of the hereditament as such.

The principle of the *Bradford* case (4)—namely, that the market value of a hereditament is the rent at which it may reasonably be expected to let to tenants in general, and not either the lower or the higher rent that tenants of a particular class might be willing to pay—has been recognized in other cases both earlier and later than that case, some of which have already been referred to on behalf of the appellants. Thus, one of the points decided in the case of *Sunderland Overseers* v. *Sunderland Union* (5) was that the rateable value of a tied public-house is not to be decreased by reason of the burden cast upon it by the tie, but is to be that of a free house; and that case was regarded by Lord Atkinson

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(1) [1935] 1 K. B. 26; on appeal [1937] A. C. 26.

(2) [1898] 2 Q. B. 639.

(3) [1937] A. C. 26.

(4) [1898] 2 Q. B. 630.

(5) 18 C. B. (N. S.) 531.

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in *Poplar Assessment Committee* v. *Roberts* (1) as an authority for the proposition that the existence of the tie must be disregarded. Other cases previous to the *Bradford* case (2), which gave support to the principle there laid down were *Reg.* v. *London & North Western Ry. Co.* (3), and *Reg.* v. *School Board for London.* (4) The statement made by Blackburn J. during the argument in the former of these cases that "the rateable value of an occupation may be enhanced by profit made elsewhere" (5), even if it was correct when made, is no longer correct since the *Bradford* case. (2)

The same principle is emphasized in several subsequent revenue cases—namely, *Rossdale* v. *Fryer* (6), where Scrutton L.J. said: "I believe it is the law, that the fact that a tenant pays more or less than he might reasonably be expected to pay would have no effect on the assessment under Sch. A or the amount of tax that had to be paid"; *Inland Revenue Commissioners* v. *Clay* (7), where it was pointed out by Swinfen Eady L.J. that the market is the open market as distinguished from an offer to a limited class only; and *In re Sir William Thomas Paulin* (8), where Lord Hanworth M.R. observed that "the term 'open' market imports that there is to be no restriction on the persons who may become buyers—no section of the community is to be excluded." The principle of *Rex* v. *New River Co.* (9), where it was held that land whose annual value was improved by a spring arising there might be rated at the improved value, although the occupying owner received no profit from the spring, has no bearing on the present case.

Even if the *Bradford* case (2) is wrong in principle, the facts that for the last thirty-nine years it has remained unimpeached and has been acted upon by rating authorities throughout the country constitute sufficient reasons why it should not be overruled. Where a decision of long standing

(1) [1922] 2 A. C. 93, 114.
(2) [1898] 2 Q. B. 630.
(3) L. R. 9 Q. B. 134.
(4) (1886) 17 Q. B. D. 738.
(5) L. R. 9 Q. B. 134, 141.
(6) [1922] 2 K. B. 303, 312.
(7) [1914] 3 K. B. 466.
(8) [1935] 1 K. B. 26, 43; on appeal [1937] A. C. 26.
(9) (1813) 1 M. & S. 503.

has been continuously recognized and acted upon, and never overruled by any higher Court or by statute, it should be regarded as of unimpaired authority: see *Townley Mill Co.* (1919) v. *Oldham Assessment Committee.* (1) It has been pointed out on behalf of the present appellants that in *Hamilton* v. *Baker* (2) the House of Lords overruled *The Mary Ann* (3), but Lord Watson there observed at the end of his judgment (4), that the authority of that case had in the meantime been questioned in several other cases. Similarly, *West Ham Union* v. *Edmonton Union* (5), overruled the case of *Reg.* v. *Tipton* (6), but Lord Atkinson there mentioned that that case had previously been disapproved of in more than one subsequent case. In *Ricketts* v. *Colquhoun* (7) Lord Cave L.C. said that he would hesitate long before overruling the case of *Cook* v. *Knott* (8), which had stood for thirty-eight years and on which subsequent legislation might have been based.

In *John Smith & Son* v. *Moore* (9) Lord Sumner said (10), in regard to the case of *City of London Contract Corporation* v. *Styles* (11), that it was decided thirty-three years before, that it had never been questioned, that it had been expressly approved in several later cases, that, even if he doubted it, he would follow it, and that tax cases ought not to be unsettled. In *Grinter* v. *Fleming* (12) the *Bradford* case (13) was held applicable. It has been said on behalf of the present appellants that the same principle of valuation should be applied to rating cases and to Sch. A income tax cases.

If the Court should hold that the *Bradford* case (13) was wrongly decided, the result will be that the practice in regard to valuation for the purposes of both rating and Sch. A income tax will be disorganized.

(1) [1936] 1 K. B. 585, 622, 635; decision of C. A. reversed in H. L. [1937] A. C. 419.

(2) (1889) 14 App. Cas. 209.

(3) L. R. 1 A. & E. 8.

(4) 14 App. Cas. 209, 220.

(5) [1908] A. C. 1.

(6) (1842) 3 Q. B. 215.

(7) [1925] A. C. 1.

(8) (1887) 2 Tax Cas. 246.

(9) [1921] 2 A. C. 13.

(10) Ibid. 38.

(11) (1887) 2 Tax Cas. 239.

(12) (1900) 4 Tax Cas. 239, 248, 252.

(13) [1898] 2 Q. B. 630.

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Comyns Carr K.C. in reply. In the *Ashby's Cobham Brewery Co.'s* case (1), where the amount of compensation in the case of a referred licence was held to depend on s. 7, sub-s. 5, of the Finance Act, 1894, under which "the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased," Kennedy J. held the term "market value" must be given the widest meaning and that the tribunal which had to ascertain the market value of licensed premises could not refuse to admit evidence of profit which a possible purchaser would treat as a material factor in forming a judgment as to the value of the premises. In so deciding Kennedy J. inferentially rejected Channell J.'s definition of market value in the *Bradford-on-Avon Assessment Committee* v. *White.* (2) In *Truman, Hanbury, Buxton & Co., Ld.* v. *Inland Revenue Commissioners* (3) Hamilton J. followed the principles laid down by Kennedy J. in *Ashby's Cobham Brewery Co.'s* case. (1) He referred to Channell J.'s dictum in *Bradford-on-Avon Assessment Committee* v. *White* (2), but not with approval; he merely held that it had no bearing upon the point that he had to determine. *Bradford-on-Avon Assessment Committee* v. *White* (2) cannot stand with the *Ashby's Cobham Brewery Co.'s* case (1); one of them must be wrong. The case of *In re Sir William Thomas Paulin* (4) also depended on the definition of "open market" in s. 7, sub-s. 5, of the Finance Act, 1894. No reference was made in the course of the argument to the *Bradford* case. (5) Lord Hanworth M.R., who differed from the majority of the Court, arrived at his decision on the facts of the case, but he fortified his decision by a reference to Channell J.'s dictum in the *Bradford* case. (2) In *Paulin's* case (6) the House of Lords reversed the decision of the majority of the Court of Appeal and approved the decision of Lord Hanworth M.R. But it cannot be said that the House of Lords thereby approved the decision of Channell J. in the *Bradford* case. (1) If they had approved of that case they would have overruled the decisions of Kennedy J. in the *Ashby's Cobham Brewery Co.'s* case (2) and of the Court of Appeal in the *Truman, Hanbury & Buxton Co.'s* case (3) and they certainly did not intend to override those cases. In *Alfred Leney & Co., Ld.* v. *Whelan* (4) both sides considered that they were bound by a valuation of a public-house made for assessment to income tax under Sch. A, which was wrong because it followed the basis laid down in the *Bradford* case. (1) The Crown did not appeal against that valuation on the ground that that case was wrongly decided, but on another ground; and it was not in the brewers' interest to contend that the *Bradford* case (1) was wrongly decided, and therefore anything there said with reference to the *Bradford* case (1) was obiter. Lord Hanworth M.R. expressed the view (5) that Channell J.'s dictum in the *Bradford* case (6) was correct, but that expression of opinion was purely obiter as the point had not been argued or dealt with. When *Leney's* case went to the House of Lords (7) no reference was made either in the argument or in the speeches to the *Bradford* case. (1) The mischief in the *Bradford* case (1) arose from a misunderstanding by the Court of what was decided in the *Sunderland* case. (8) The two members of the Divisional Court in the *Bradford* case (1) arrived at their decision upon different and inconsistent grounds, and therefore that case is of no value as a binding authority.

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(1) [1906] 2 K. B. 754.

(2) [1898] 2 Q. B. 630, 639.

(3) [1912] 3 K. B. 377.

(4) [1935] 1 K. B. 36; [1937] A. C. 26.

(5) [1898] 2 Q. B. 630.

(6) [1937] A. C. 26.

Cur. adv. vult.

1937. March 23. The following judgments were read:—

GREER L.J. This appeal raises a question as to the true meaning and effect of s. 1 of the Parochial Assessments Act, 1836, and its application to the facts stated in the case. The appeal is concerned with the rateable value of a fully licensed public-house which, as stated in para. 2 of the case, had

(1) [1898] 2 Q. B. 630.
(2) [1906] 2 K. B. 754.
(3) [1912] 3 K. B. 377.
(4) [1934] 2 K. B. 511.
(5) [1934] 2 K. B. 5.
(6) [1898] 2 Q. B. 639.
(7) [1936] A. C. 393.
(8) 18 C. B. (N. S.) 531.

been at all material times occupied by the appellant company and managed by a manager in the employment of the company. All the draught beer sold and some of the bottled beer sold in the said hereditament had at all material times been beer brewed by the company or by its associated company, and considerable quantities of bottled beer brewed by Messrs. Bass and Messrs. Worthington were also sold. The case also states that a brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make. There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament. The case also stated that, if regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) thereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of 112*l*. Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.

Quarter sessions, notwithstanding the opinions expressed in the case, came to the conclusion that they were bound to follow the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1), and they accordingly allowed the appeal, and fixed the gross value of the said hereditament at 95*l*. If they had considered that they were not bound by the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1), they would have fixed the gross value of the said hereditament at 112*l*.

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(1) [1898] 2 Q. B. 630.

The assessment committee appealed from the decision of the quarter sessions to the Divisional Court, who dismissed the appeal on the grounds that they were bound by the decision in *Bradford-on-Avon Union* v. *White* (1) and that they agreed with that decision.

In my judgment the decision in *Bradford-on-Avon Union* v. *White* (1) was plainly wrong, and we are, therefore, entitled, according to the views expressed by the House of Lords in *City of Westminster* v. *Southern Ry. Co. and W. H. Smith & Son, Ld.* (2), and *City of Westminster and Kent Valuation Committee* v. *Southern Ry. Co. and Pullman Car Co.* (2) to overrule it, notwithstanding the fact that annual values and rateable values have been fixed for a long time on the assumption that the decision was right. In my judgment the decision was wrong; it is difficult to understand the logic of the two judgments. It is quite clear that there are many cases where, if a hereditament were in the market, its annual value would necessarily be decided by the offer that could reasonably be expected from a special class of tenants who would desire to occupy the premises for the purpose of carrying on a successful business. Houses in Harley Street fetch a higher rent by reason of the fact that, if they were in the market, physicians and surgeons who desired to have the higher standing of an address in Harley Street would compete with one another, and the tenancy would go to the highest bidder in this class. If a valuer were asked to value a house in Harley Street, he would obviously have to take into consideration the price that could reasonably be expected to be given in the market in which the principal offerers were medical men who for reasons of their own were prepared to give a larger rent than any other class of tenant. It is pointed out by Channell J. in his judgment in the *Bradford* case (1) that the value of any property for the purposes of rating is to be determined by the "higgling" of the market. If it is to be so determined, it seems to me quite illogical to say that you are entitled to consider that some of the individuals so higgling in the market would give a higher price than any one else, and at the same time dismiss from your consideration what would be the highest rental established in the market. You are surely not entitled to say that the brewers should be allowed to go into the market and there compete with one another, and at the same time to exclude the price that they would be willing to pay as the result of such competition, and confine the value of the public-house to the point at which the ordinary tenant would refuse to go further in the competition. The value of any property may reasonably be expected to depend on the rent that would be produced by allowing all the contestants to bid against one another in the market. You cannot find the value due to the higgling of the market by excluding those who are nowadays the principal higglers—namely, the brewers.

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(1) [1898] 2 Q. B. 630.
(2) [1936] A. C. 511.

It was argued by the respondents that it is too late for the Court to reverse the decision in the *Bradford* case (1), because it was decided in the year 1898, and year after year assessments have been based on the assumption that the decision was right. *West Ham Union* v. *Edmonton Union* (2) and *Hamilton* v. *Baker* (3) are cases in which previous decisions were held to be plainly wrong and were overruled by the House of Lords after more years than have passed between the date of the decision in the *Bradford* case (1) and the present date: see also the decision already cited in *City of Westminster* v. *Southern Ry. Co., etc.* (4) In that case Lord Wright said (5): " There is no rule which debars your Lordships from doing justice even at the cost of reversing an old authority, that is an authority of a Court inferior to this House." Later (6) he cites as follows the principle stated by Lord Loreburn in the *West Ham* case (2): " Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them." The other Lords who took part in the decision do not expressly deal with this question, but their speeches necessarily involve the overruling of the case referred to by Lord Loreburn.

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(1) [1898] 2 Q. B. 630.
(2) [1908] A. C. 1.
(3) 14 App. Cas. 209.
(4) [1936] A. C. 511.
(5) Ibid. 563.
(6) Ibid. 564.

In the present case I am of opinion that practical injustice must follow if we act on the Divisional Court's decision in the *Bradford* case (1), inasmuch as brewers would be relieved from being rated on the true value of public-houses carried on on their behalf, with the result that other hereditaments would suffer from over-rating.

There has been no decision in the House of Lords where the question necessarily arose as to whether the decision in the *Bradford* case (1) was right, though there have been some dicta which assumed that it was right, see per Hamilton J. in *Truman, Hanbury, Buxton & Co., Ld.* v. *Commissioners of Inland Revenue* (2) and per Lord Blanesburgh in *Commissioners of Inland Revenue* v. *Crossman.* (3)

There is one other case on which I think I ought to say something, that is the case of *Sunderland Overseers* v. *Sunderland Union.* (4) That case was concerned with the estimated rental of a brewery. Any one tendering a rent for the brewery would not be entitled to assume that he would get with the tenancy of the brewery not only the brewery, but a portion of the brewery's trade. The competing tenant is not supposed to be competing for any portion of the business of the brewery, but only for the brewery itself. A brewer who is willing to let his brewery may be quite unwilling to part with any portion of his trade or his contracts with the tied houses. Having granted his brewery to a tenant from year to year, he could set up a brewery elsewhere and keep the value of his personal agreements with the existing tenants of his houses. He is not to be assumed as putting his brewery in the market together with all his personal contracts with his tenants.

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(1) [1898] 2 Q. B. 630.

(2) [1912] 3 K. B. 377.

(3) [1937] A. C. 26, 62.

(4) 18 C. B. (N. S.) 531.

What the hypothetical tenant is offering for is a tenancy of the brewery, and not in any sense offering for the trade of the brewery. This case seems to me to have no bearing on the question we have to determine. As I have already said, in my judgment the decision in the *Bradford* case (1) was plainly wrong, and we are not bound by it and are entitled to overrule it.

For these reasons, in my judgment the appeal should be allowed and the gross value of the public-house in question should be declared to be 112*l.*, and the rateable value that amount less the statutory deductions. I have not found it necessary to deal in detail with the various cases cited by Mr. Latter and his junior; but I have had the advantage of reading the judgment of Scott L.J., and I agree with what he says about those cases.

Slesser L.J. desires me to say that he has read the judgment which I have just delivered and the judgment of Scott L.J. in this case, and he agrees with them and that the appeal should be allowed.

Scott L.J. The appellants in this Court are the Assessment Committee for the No. 7 or Houghton and Chester-le-Street Assessment Area of the county of Durham, and the respondents are Robinson Brothers (Brewers), Ld., a brewery company whose name appeared in the valuation list in respect of their occupation of a fully licensed public-house called the "White Lion Hotel," which they owned and occupied, conducting its business by a manager appointed by themselves. The gross value was entered at 112*l.* They made a proposal under s. 37 of the Act to the appellant committee to reduce it, but the latter refused. They then appealed to quarter sessions, and there succeeded, on a legal argument, in obtaining a reduction to 95*l.* From that decision the present appellants appealed by special case, but the Divisional Court, consisting of the Lord Chief Justice, Humphreys and du Parcq JJ., dismissed the appeal; hence the appeal to us. There is some little confusion between the names of appellants and respondents in the different stages below, but I will identify the parties by their position in this Court, calling the committee "appellants" and the company "respondents."

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(1) [1898] 2 Q. B. 630.

The appeal raises the question of what is the real effect of the provisions of the Rating and Valuation Act, 1925, in regard to ascertaining the gross value of any hereditament—in this case a fully licensed public-house. The dispute turns, to a great extent, but not in my view wholly, on the old statutory test of the hypothetical tenant, which now appears as a definition of gross value in s. 68 in words which are nearly identical with those used from the 1836 Act onwards: "the rent at which a hereditament might reasonably be expected to let from year to year." The statutory task thus set looks like a simple economic problem, but few problems have given rise to more litigation and more difference of judicial opinion. It is obvious, therefore, that it is not as simple as it looks. The present appeal is just another illustration of the judicial conflict. The Divisional Court followed the decision of another Divisional Court given thirty-nine years ago in the *Bradford* case (1), where the facts found by quarter sessions were somewhat similar. They said they felt bound by it; but they also said they agreed with the reasoning of the judges in the case and reaffirmed the principles there laid down. To-day we in this Court are taking the contrary view and are allowing the appeal, because we disagree with the reasoning in that case and think that its so-called principles are erroneous. With such differences of judicial opinion I confess to a feeling of diffidence: but I cannot say I entertain any doubt. Although, if there was a clear ratio decidendi in the *Bradford* case (1), it was binding on the Divisional Court, the case is, of course, not binding on us; but the respondents contend that it has subsequently been clothed with binding authority by approval in the Court of Appeal or even in the House of Lords, or, alternatively, by the length of time that it has stood unattacked.

The argument of the appeal before us naturally, therefore, involved a double contest: (1.) as to whether *Bradford* case (1)

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(1) [1898] 2 Q. B. 630.

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was wrongly decided and, if so, what the right legal principles are, and (2.) whether, even if we were disposed to hold that *Bradford* case (1) was wrongly decided, we are not precluded from giving effect to that view. In my opinion the appellants ought to win both contests.

Logically, the second issue comes first, but I think it will help in the consideration of the cases where the *Bradford* case (1) has been discussed if I begin with the issue of principle. In my view facts are found by quarter sessions which compel us to allow the appeal. It is, I think, impossible in law to do anything but enforce the decision which the sessions actually reached in their own minds and would have applied but for the question of law which the respondents desired to argue on the strength of the *Bradford* case (1) decision. The special case, signed by His Honour Judge Richardson as chairman of quarter sessions, is very clearly stated. It finds facts quite definitely and unambiguously, not confusing evidence with findings upon the evidence and not mixing up law and fact. It is so short that there is nothing to be gained by attempting to summarize it: but the dominant findings of fact are these. The respondent company was assessed in the current valuation list as occupier of the White Lion Hotel, a fully licensed public-house in the Houghton-le-Spring urban rating area, at 112*l.* gross and 90*l.* rateable value. In accordance with the procedure of s. 37 of the Rating and Valuation Act, 1925, the company applied for a reduction; but the assessment committee refused it. The company appealed to quarter sessions under s. 37, sub-s. 8, on the ground that the assessment was "excessive having regard to the volume of trade." This reason should be borne in mind. The company was in occupation through their manager, in accordance with the general practice of the assessment area, "practically all the public-houses in the area being owned by brewers and managed, or sublet to tied tenants"; (para. 2 (*b*)). The obvious economic motive of the brewer is stated in para. 2 (*c*): increased output and increased profits. In para. 2 (*d*) the case records the practical certainty of competition amongst brewers, not only as purchasers, but even for a tenancy of the White Lion, if vacant. The first half of para. 2 (*e*) is the cardinal finding of fact in the whole special case: "If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) hereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of 112*l*." For reasons which I will develop presently, I think that this sentence is conclusive of the appeal and entitles the appellants to our judgment. The sub-paragraph goes on to state two other findings of fact: "Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure." These two facts are presumably stated merely for the purpose of clearing the ground; in view of the other facts found in the case, particularly in the first half of para. 2, sub-para. (*e*), they have no relevance to the problem which we have to solve. Now comes the sub-paragraph on which the judgment below rested, para. 2, sub-para. (*f*): "If the competition of the brewers is taken into consideration but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (*c*) hereof are excluded from consideration except so far as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by those reasons, the rent at which the said hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of 95*l*." This sub-paragraph is taken from the *Bradford* case. (1) It was obviously inserted for the sole purpose of enabling the respondent company to argue that the facts fall within the decision in that case. I think it does successfully epitomise

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(1) [1898] 2 Q. B. 630.

(1) [1898] 2 Q. B. 630.

that case; but it at the same time brings out what I think was the fallacy of that decision. There is no doubt that the offers of non-brewer competitors for a vacant public-house would tend to be pushed up by the prospect of brewer competition; but, if it was the fact, as the sub-paragraph finds, that even one brewer would offer to pay a higher rent than any of the non-brewers desiring the tenancy, why is that fact not economic evidence of the existence of a higher real rental value than the non-brewers would pay for; and, if there were several brewers so desiring to compete, as the case finds, why is that not a fortiori evidence to that effect? In my view it would be wholly wrong to "exclude the rents" mentioned in sub-para. (*c*) "from consideration," as to do so would be to exclude evidence which it was most material for the valuer to consider and in effect to command him to shut his eyes to vital information bearing upon his estimate of real value. This is the cardinal and, apart from the contention that the *Bradford* case (1) has been made binding on us by superior judicial authority, I believe the only question of law directly raised by the present appeal, although many collateral aspects indirectly bearing on it have been discussed and call for consideration.

The statutory test has been so much discussed in the Courts, including the House of Lords, that it seems absurd to go back over the old ground; but, as I am differing from the court below and am doing so because their decision seems to me to involve a departure from the one basic principle of that test, I feel bound to cite some of the leading judgments in which the meaning and applications of the test have been explained. It will be convenient to state the steps by which I reach my conclusion before quoting the authorities which I think support my view. The relevant steps (partly law, partly facts) as found in the special case appear to be these: (1.) The hereditament to be valued under s. 22 of the Act is always the actual house or other property for the occupation of which the occupier is to be rated, and that hereditament is to be valued as it in fact is—rebus sic stantibus. (2.) Where

(1) [1898] 2 Q. B. 630.

the particular hereditament is let at what is plainly a rack rent or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason is alone admissible; indirect evidence is excluded not because it is not logically relevant to the economic inquiry, but because it is not the best evidence. (3.) Where such direct evidence is not available, for example, if the rents of other premises are shown to be not truly comparable, resort must necessarily be had to indirect evidence from which it is possible to estimate the probable rent which the hypothetical tenant would pay. (4.) This kind of estimating is a skilled business, and it is here especially that the rôle of the skilled valuer comes in. His employment is plainly contemplated by all the rating statutes of the last hundred years and has always been the practice in all disputes upon quantum of assessment, but, above all, wherever resort to indirect sources for assessing value is necessary. (5.) In weighing up the evidence bearing upon value, it is the duty of the valuer to take into consideration every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down, just because it is relevant to the valuation and ought therefore to be cast into the scales of the balance before he looks to see the resultant figure on the dial at which the pointer finally rests. (6.) A skilled valuer is a professional man and must be left free to inform his mind of all relevant facts. It is only where it can be shown that he has had regard to some fact which is legally irrelevant or vice versa that his valuation is open to legal attack. (7.) When the assessing tribunal, whether assessment committee or quarter sessions, has to make its own valuation in a contested case about a gross assessment, the tribunal, not being itself professionally skilled in valuation, must necessarily act on evidence, including expert evidence, and that evidence must be relevant; but, wherever the direct evidence test is not available, no fact which would in all the actual circumstances of the case tend to raise or lower the amount of rent likely to be given by probable competitors can be either irrelevant or inadmissible.

(8.) The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for that hereditament, in the light of competition or its absence in both demand and supply, as a result of "the higgling of the market." I call this the true rent because it corresponds to real value. (9.) This true rent is often called "market value," but I hesitate to use that expression, as it seems to me prone to mislead, for it gives rise to the notion of something absolute, something having an objective existence, independent of all the various particular sources of demand, which together constitute the totality of demand. The phrase "market value" is not used in the special case, but it was used in the judgment below of the Lord Chief Justice (in effect quoting the judgment of Channell J. in the *Bradford* case (1) to describe the lower measure of value stated in para. 2 (*f*) of the present special case and the higher figure there mentioned as attributable to the competition of brewers is spoken of as something over and above "market value." This, in my view, is an economic paradox. The only conceivable purpose for which the metaphor of "market value" can properly be used in cases where there is in fact no market test of actual rents is to describe the real value (expressed in terms of the statutory test) which s. 22 requires the assessment committee to ascertain. If this be so, then to speak of a hereditament possessing both a market value of £X and a higher value of £X plus £Y due to a special factor of demand is a contradiction in terms. In my opinion, the higher value is, in that event, the market value in the only sense in which that phrase can properly be used in such a case. (10.) The nature of the disagreement between me and the *Bradford* case (1) Divisional Court, which I have just stated, is perhaps made clearer if discussed from the evidence side; that is to say, by considering what evidence is admissible on such an inquiry. The objective being the real value of the actual hereditament, the inquiry is primarily economic and not legal; it is only legal in so far as logical relevance is the measure of legal admissibility. That the value is to be expressed in the terms of the statutory definition of gross value is "nothing to the matter," as Lord Holt would have said; that definition does not prevent the objective being the real value; it merely states certain data in regard to the terms of the hypothetical tenancy which are to be assumed in order to get a fixed instead of a variable figure. Some terms must be assumed by every valuer in any calculation: the statute merely chooses the terms, in order that all resultant figures may be strictly comparable; but the statutory definition contains no provision which prevents real value being the one and only objective of the inquiry. (II.) On such an inquiry every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence for the assessment committee or its valuer or the quarter sessions on appeal to consider.

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(1) [1898] 2 Q. B. 630.

The following considerations show that the demand of the brewers mentioned in para. 2 (*e*) of the case is logically a vital aspect of the economic demand upon which the real value of the house must rest. (*a*) The intrinsic characteristic of a licence possessed by the White Lion is relevant, just because beer cannot be sold in unlicensed premises and the licence gives the licensed house a monopoly value in respect of volume of trade, whilst the high probability of renewal of the licence carries a business assurance of the continuance of the trade. (*b*) Other things being equal, the fewer licensed houses there are in the area, the greater will be the share of the trade enjoyed by any one or, in other words, its monopoly value; and this extrinsic circumstance must tend to stimulate the economic desire of all brewers within business reach to possess any such house, if unoccupied, and, therefore, to increase demand for it and push up its real value. (*c*) Similarly, the more brewers there are within business reach who want to enjoy the profits of its monopoly value, the greater will be the demand for the particular house of which the statutory hypothesis postulates vacant possession.

The steps in the reasoning process, which I have just stated without any attempt at logical completeness, lead, in my opinion, inevitably to the conclusion that the sessions were right, as a question of rating law, in taking into consideration the fact that "there were several brewers who might reasonably have been expected to compete with each other" for the White Lion, if vacant; or, putting the same question in terms of the law of evidence, that that evidence was admissible on the issue of quantum of real value, just because it was economically relevant. Even if it had only been one brewer who would have been ready to offer a rent of 112*l.*, the evidence would have been logically admissible, although a tribunal of fact dealing with so theoretical a demand might well insist on corroboration or refuse to accept the evidence at its full face value. Here the decision of fact reached by the sessions is open to no such criticism, for they have answered it in advance by two findings: (1.) that there were in fact several such competing brewers, and (2.) that they have made all due allowance for the hypothetical character of the expert evidence given before them to that effect, for they say in effect that the figures proved were sufficiently above 112*l.* to make that figure, in their opinion, a safe one. On these questions of pure fact the findings of the sessions must be treated as really final.

The special case raises only one question of law—namely, whether there is any fact found in para. 2 (*f*) of the case which in law prevents effect being given to the sessions' finding in the first half of para. 2 (*e*). I have already stated my opinion that a negative answer must be given to that question, although I recognize that para. 2 (*f*) repeats with fidelity the reasoning and almost the very words of Channell J.'s judgment in the *Bradford* case. (1)

The next step, therefore, is to justify my opinion by references to the Act and authorities and then to explain where and why I disagree with the reasoning of the judges in that case.

The relevant provisions of the Rating and Valuation Act,

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(1) [1898] 2 Q. B. 630.

1925, "which embraces within its provisions the law as to rating and valuation which is to prevail when and where the Act applies" (per Lord Russell of Killowen in *Townley Mill Co.* (1919), *Ld.* v. *Oldham Assessment Committee* (1) are contained in the following sections: s. 17, sub-s. 1, and s. 18, sub-s. 2 (Assessment Committees and their duties); s. 19 to s. 22 (valuation lists); s. 28, sub-ss. 1, 3 and 5; s. 31; and s. 37 (which, taken together, lay down the procedure for appeal to the assessment committee to amend the list); s. 38 (power to any rating authority or assessment committee to employ valuers); and s. 68 (definitions of "gross value" and "hereditaments") and in the Second Schedule, Part I. (classification of hereditaments). Every hereditament has to be valued and to appear with its appropriate particulars in the valuation list. "Subject to the provisions of this Act, there shall be inserted in the valuation list such particulars with respect to every hereditament in the rating area and the value thereof as may be prescribed." (Sect. 21, sub-s. 1.) Sect. 22, sub-s. 1, which deals with deductions from gross value for the purpose of fixing rateable value, refers to the descriptive lists in the Second Schedule. Whether a public-house is a "house" within Part I. or "a building of similar character to a manufactory" may not be clear; but, at any rate, it has to appear in the valuation list somewhere (see s. 20), and for present purposes it does not matter what its proper classification is under the Schedule. Sect. 22, sub-s. 1, in effect directs every valuation committee to ascertain the gross value of every hereditament in its area; and the definition of "gross value" in s. 68 is, for present purposes at any rate, identical with the statutory provisions which have been in force since 1836. The legal error, if any, in the judgment of the court below was in the interpretation of this definition: it is therefore vital to keep the essential words of it in mind. This is what the statute says: "'Gross value' means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent: Provided that, in estimating the annual rental value of a hereditament to a tenant, no account shall be taken of the value of any services which the landlord renders, or procures to be rendered, to the tenant (either alone or in common with other tenants of the landlord) other than the provision of, or repairs to, or maintenance of, the hereditament."

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(1) [1937] A. C. 419, 427.

The task of the assessment committee in the present case was to ascertain " at what figure the hereditament in question " —that is, the White Lion Hotel, Houghton-le-Spring— " might reasonably be expected to let from year to year "— on the assumptions of the definition. Whilst the tenant is hypothetical and the landlord who is to let to the tenant is necessarily also hypothetical, the hereditament is actual— namely, the hereditament described in the valuation list with all its actualities. Two consequences follow. All the intrinsic advantages and disadvantages must be considered and weighed. It is just that particular hereditament which is supposed to be in the market with all its attractions for would-be tenants, to whatever kind of human emotion or interest or sense of duty they may appeal—economic, social, æsthetic, political (for example, in order to perform a statutory duty)—and also with all its imperfections and drawbacks which may deter or reduce competition for it. That is why in valuing a public-house you must take into account its licence, with the statutory implications of the licence, as for instance, on the one hand, its monopoly value, and, on the other, the degree to which in that area the competition of other licensed houses may reduce the profit-making quality of that particular house and so prejudice the demand for it. The second consequence is that the totality of opposing forces of demand and supply must be assessed and weighed in order to hit off the point at which the two opposing negotiators are to be deemed likely to strike their bargain. I think that this is exactly what the quarter sessions have done in para. 2, sub-para. (*e*); but that the adoption by the Divisional Court of the alternative stated in para. 2, sub-para. (*f*) disregards a most important part of the economic demand, and, therefore, involves an arbitrary and illogical exclusion of evidence directly relevant to the assessment of the real rental value, which is the objective of s. 22, sub-s. 1, and of the definition of gross value which must be read into that sub-section, and thus defeats the object of the Act. I can see no words in the definition which afford any ground for the exclusion of that evidence and I believe that my view, based upon the reasoning to which I have already given expression, is supported by the long line of authorities on the equivalent provisions of the earlier Acts.

I begin with a reference to some of the earlier railway and canal cases, for four reasons: (1.) that they are typical profit-earning hereditaments endowed by statute with monopoly rights; (2.) that no one could conceivably take them on a tenancy except for the purpose of making profit out of the occupation; (3.) that, however difficult it is to estimate from probable profits the rent which the hypothetical tenant desiring those profits might reasonably be expected to pay, the task has to be performed by the tribunal of fact in every assessment of that type of hereditament; (4.) that in the case of such a statutory undertaking it is obvious that the "year to year" tenancy must be interpreted with the implied addition that a prospect of continuance may be assumed. Compared with the practical difficulties of that type of case (against which Lord Campbell C.J. protested in 1859 in the canal case of *Reg.* v. *Coventry Canal Co.* (1)) the assessment of a public-house, where there is general competition amongst all the brewery companies of the district to get it in order to run it with their own manager and so increase their profits, is mere child's play. In *Reg.* v. *London & South Western Ry. Co.* (2) and *Reg.* v. *Grand Junction Ry. Co.* (3) the principles to be applied in ascertaining the rental value of railways for the purpose of rating were laid down on lines which have ever since been followed. In the 6th edition of Ryde on

(1) (1859) 28 L. J. (M. C.) 102, 104.
(2) (1842) 1 Q. B. 558.
(3) (1844) 4 Q. B. 18.

Rating there is a very clear statement of the law so established and his citations there from Lord Denman's judgment in the later of the two cases (1) in my opinion show that, wherever the rental value has to be ascertained by reference to the opportunity of profit afforded by the occupation of the hereditament, every source of profit, direct or indirect, must be taken into account, for the simple reason that it must affect the mind of the hypothetical applicant for a tenancy.

These cases also dispose of the contention, which was suggested rather than argued before us for the respondent company, that the statute forbids any account being taken of a tenancy lasting more than a year and that, therefore, although brewers might be ready enough to buy, the idea of their competing for a tenancy is in a practical sense absurd. The answer is that the statute properly construed does not so limit the hypothetical tenant's prospects. The idea of a lease for years is excluded, but the prospect of the tenancy from year to year continuing must be assumed. This rule of law was explained and applied by Lord Hewart C.J. in the recent case of *Consett Iron Co., Ld.* v. *Durham* (2); see also *Great Eastern Ry. Co.* v. *Haughley* (3) and *Reg.* v. *South Staffordshire Waterworks Co.* (4)

As the appeal turns on the exclusion of part of the evidence of demand for the house, it is worth observing that the economic relevance of demand and supply to the ascertainment of the real rent has been recognized from early days: see, for instance, *Reg.* v. *The Company of Proprietors of the West Middlesex Waterworks* (5), where Wightman J. said (6): "Value is derived entirely from the relation of demand to supply, and if a water company comes into competition with a mere agriculturist for land for waterworks, an addition is made to the value of such land by the additional competition . . . . Upon the common principles regulating value, it is enhanced in proportion to the scarcity of the thing in demand; so that, if a few levels only were suitable for the required transit, or a few sources of water alone were accessible, the price would be higher."

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(1) 4 Q. B. 18, 36–41.

(2) (1929) 46 Times L. R. 53, 56.

(3) (1868) L. R. 1 Q. B. 666, 679, 685.

(4) (1885) 16 Q. B. D. 359, 370.

(5) (1859) 28 L. J. (M. C.) 135.

(6) Ibid. 138.

The chain of reasoning, to which I have just given expression, is, in my view, justified by the authorities, particularly that no element of demand should be ignored. I begin with the famous judgment of the Court of Queen's Bench, delivered by Blackburn J. in *Mersey Docks Board* v. *Liverpool.* (1) The question there was what rent would the hypothetical tenant give for the whole dock system vested in the Mersey Docks and Harbour Board by their Acts of 1857 and 1858. In that judgment there is this passage (2): "Where the hereditaments, or hereditaments of a similar kind, are in practice actually let at a rent, the amount of which is ascertained by what has been called 'the higgling of the market,' the application of this definition is easy and simple. Where the hereditaments are not in practice let the problem becomes more difficult. The facts and circumstances, which would be taken into consideration by those who in the case of a real tenancy do in the higgling of the market fix the rent, are to be taken into consideration, and on a view of all those the net annual value of the occupation is to be determined; and in many cases the amount that is made by the trade carried on by the occupier's occupation, less an allowance for the profits which the tenant might elsewhere make by his trade, is an important element in the evidence of the annual value. In such a case as *Reg.* v. *Southampton Docks* (3) they were properly allowed; but it is not always so. If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element,

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(1) (1873) L. R. 9 Q. B. 84.
(2) Ibid. 96.
(3) (1852) 17 Q. B. 83.

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except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business. For instance, to explain our meaning, there can be no doubt that the annual rent of a shop in Cheapside is higher than the annual rent of a similar shop in a back street ; and that the reason why tenants give a higher rent is because of the superior facility for carrying on business there. But the rent and the rateable value of the shop are quite independent of the amount of the shopkeeper's actual gains. The rateable value is the same whether the tenant is a flourishing trader or is carrying on business at a loss. So, no doubt, in fixing the rent of chambers in one of the Inns of Court, the facility for carrying on the legal profession in them is an element, and an important one, but the actual income of the tenant is not. The chambers command no more rent when let to the Attorney-General than they would do if let to a young barrister just called who does not as yet pay his expenses." (1)

I believe that that passage, often cited in subsequent cases, contains nearly all the law necessary for the solution of the problem which we are called on to solve in the present case. Two features are particularly worth noting ; the only reference to the " market " is in the phrase " higgling of the market," which the learned judge there uses in regard to the way in which the figure of an actual rent gets fixed by negotiation in the light of the active demand in and the available supply to a market. He no-where says of the statute that it makes the existence of an actual market a condition to be satisfied before the assessment committee can legitimately reach the conclusion that the hereditament has an annual value or that its value is £X. He recognizes that, as in the case then before the Court, there may often be no market value, or that such value can only be ascertained within approximate limits. Three principles are implicit in the judgment : (1.) that the real value of the hereditament must be ascertained so far as an estimate can ascertain it ; (2.) that that value will, like all other values, depend on and be fixed by the economic forces of demand and supply in every case where the hereditament is of a kind to admit of those forces operating; and (3.) that every imaginable motive affecting human nature which makes people want a thing, whether a commodity or a hereditament, creates demand, and thus affects value. Further, and this is equally important, in enunciating these basic principles of rating valuation he brings out clearly the distinction between material facts and the evidence by which they are to be established. This distinction is of absolutely first-rate importance in rating cases about valuation, for much confusion is apt to arise through ignoring it. I think this happened in the *Bradford* case. (1)

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(1) L. R. 9 Q. B. 84, 96.

In the case of *Reg.* v. *London & North Western Ry. Co.* (2) the same learned judge follows the same logical path. The question was whether a small length of railway, which brought the company little direct income within the rating area but a large income elsewhere, should be assessed without taking into consideration this element of value to the occupying company. It was argued for the company that the assessment committee ought as a matter of law to disregard the fact, economically relevant, that the apparently unprofitable length of line was indirectly highly profitable, in that it brought grist to the company's mill elsewhere, and also the further fact there found that two other companies would have gladly acquired it in order each of them to get the benefit of the indirect profits so resulting. The rating authority contended that such indirect profit was an admissible piece of evidence showing that the real value was higher than the apparent value, as measured by the ordinary rule of thumb test applicable to the rating of railways. In the course of the argument Blackburn J. said (3): "The question seems to be, if it happens that certain persons (a limited number of persons, but more than one) are desirous to have the line, because, on becoming occupiers of it, they can get a profit elsewhere, and are willing to give a high rent for it, are we not, in estimating the rateable value, to take that into account?"

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(1) [1898] 2 Q. B. 630.
(2) (1874) L. R. 9 Q. B. 134.
(3) Ibid. 142.

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That the objective of rating assessment under the statute is the ascertainment of the real value of the hereditament (expressed, of course, in terms of the hypothetical tenancy) and not of any arbitrary figure of value higher or lower than the real value seems to me to be implicitly recognized in all the cases where a public authority is in occupation for the purpose of performing a public duty and where, therefore, no question of profit or of a demand based on the desire for profit enters in. Thus in the case of *Reg.* v. *School Board for London* (1) there was no element of profit, but none the less there was real demand and real value, because there was at least one person who wanted the hereditament and would, therefore, be a willing applicant for a tenancy—namely, the occupying School Board itself. In the report of the case in Ryde's Rating Appeals (1) Fry L.J. is recorded as saying: "The Act of Parliament does not deal with the object, or motive of the tenant; it only asks whether there is a reasonable expectation of finding a tenant, who will take the premises from any motive."

Precisely the same legal question was considered by the House of Lords in the *Erith* case. (2) Lord Herschell L.C. (3) expressly approved of the decision in the *School Board* case (1), and speaking of the non-profit-making hereditament said (4): "In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises" —again, the real value criterion. When considering profit-making hereditaments he had previously said (5): "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account."

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(1) (1886) 17 Q. B. D. 738; Ryde's Rating Appeals, 1886–1890, 235, 240.

(2) [1893] A. C. 562.

(3) [1893] A. C. 590, 591.

(4) Ibid. 593.

(5) Ibid. 592.

In the cases of the *Mersey Docks Board* (1), the *School Board* (2), and the *Sewerage Authority* (3), which I have just cited, the profit-making motive for demand was wholly absent; but in each case a motive for the actual tenant wanting to occupy the hereditament rated was afforded by the statutory duty that it was performing. In each of the three cases the Court or the House treated the inquiry ordained by the statute as a difficult one of fact, but saw no legal difficulty in carrying it out. Where better evidence is in the circumstances of a particular hereditament impossible, resort may be had to either capital value or cost of construction, either of which can, with appropriate corrections, be converted into approximately equivalent terms of annual value; and I think it follows from those three decisions that in the present case the tribunal of fact was guilty of no error of law in getting at the figure of annual value by estimating the brewers' potential demand as best it could. In the second case the profit-making motive was present as the occupier was a railway company; although no profits resulted from the occupation of the assessed hereditament, which was worked at a loss, yet its possession led to the making of large profits in other rating areas. These indirect profits were two stages removed from the hypothetical rent to be ascertained; but the Court treated those profits as constituting a conclusive motive for the actual occupier, and equally for each of the two competing railway companies wanting to occupy the unprofitable length of line in question; in other words, they concluded that real value was established and accordingly accepted the method of ascertaining annual value by inference from capital cost, which had been adopted by the assessment committee, as unobjectionable in law.

(1) L. R. 9 Q. B. 84.
(2) 17 Q. B. D. 738.
(3) [1893] A. C. 562.

In *Cartwright* v. *Sculcoates Union* (1) the hereditament was a public-house. The arbitrator to whom the assessment was referred found as a fact that it was impossible to value the house by a comparison with the rents of other more or less similar houses and accordingly admitted evidence not of actual takings, but of the volume of trade done, and received from the expert witnesses for the rating authority estimates of the value which they thought the house had in the light of that volume of trade. On that footing he found that the assessment was justified. The Court of Appeal and the House of Lords confirmed the assessment. Throughout the judgments the relevance of the prospect of profit was unquestioned, as a reason why there would be applicants anxious to become tenants. Lord Davey (2) quoted with complete approval the passage from Blackburn J.'s judgment in the *Mersey Docks* case (3), with which I began my citations, and proceeded thus: "I say, my Lords, in answer to a suggestion that was made from the bar, that in my opinion Lord Blackburn there was laying down a general principle applicable to all such cases, and not merely one that applied only to exceptional cases, where there is no market value or price or letting rent to which you can refer. And, my Lords, I venture to think that that is founded upon common sense. I repudiate this distinction which has been made so much of between exceptional and ordinary cases. You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which a tenant might expect to be able to make of the premises, the facility afforded by the premises for the carrying on of a trade appears to me to be a primary and elementary consideration in the case. If you are to take into account the fact that the premises command a trade, you must surely ask what trade. Is it a large trade, or is it a small trade? And I do not know myself any better test of what trade they may be expected to command than the trade which they

(1) [1899] 1 Q. B. 667; [1900] A. C. 150.

(2) [1900] A. C. 158.

(3) L. R. 9 Q. B. 84, 97.

actually do command. It is not that you rate the profits, it is not that you rate the man's skill and judgment or discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises as an element in determining the rent he would be willing to offer. My Lords, I entirely agree in a passage in the Lord Chancellor's judgment, which I will take the liberty of quoting and adopting as the expression of my own mind. His Lordship says: 'It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that a priori opinion by proof of the fact that it did command such a business.' A. L. Smith L.J. says: 'You may call it goodwill or you may call it anything else you like, but it is legitimate evidence to show that it is a house capable of carrying on a good trade according to the matters which have to be taken into consideration by the hypothetical tenant; and he fortifies that evidence by saying it is carrying on a good trade because I see such and such things going on every day to my own knowledge.' My Lords, that appears to me to sum up the whole of this case."

It is particularly to be noted that the *Bradford* case (1) although decided only two years before, was not cited in the *Sculcoates* case (2) in the House of Lords and, though cited in the Court below, was not mentioned in the judgments.

The principles laid down in the case of the Birkenhead lairages of the Mersey Docks and Harbour Board (*Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (3)) are directly germane to the present case. Lord Halsbury there said (4): "The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they are to arrive at it, the question of fact is simple enough as stated. . . . . That is the proposition

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(1) [1898] 2 Q. B. 630.
(2) [1900] A. C. 150.
(3) [1901] A. C. 175.
(4) Ibid. 179.

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which is put before the parish officers—that is the question which they have to answer; and they are to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all—it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law; but that is where, instead of doing what the statute has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included. Of course in that sense, when you are dealing with a question of fact which has to be answered by any tribunal, it may be that a question may come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact, namely, What is the rent which a tenant might reasonably be expected to give for the premises, subject to the deductions mentioned in the statute, as a tenant from year to year." (1) His Lordship also said (2): "To go into the amounts of profits and losses as if you were finding out what a man's income is would be absolutely irrelevant; but for the purpose of ascertaining what a tenant would be likely to give, to suggest that that is something which in point of law you have no right to inquire into would be equally absurd. All the circumstances of the particular occupation, the mode in which the trade is carried on, and the circumstances affecting either the restriction or the amplitude of the trade, are all legitimate subjects of inquiry, and the only question of law is whether the particular tribunal has followed the line I have indicated or not." (2) The above passages to my mind are conclusive that the tribunal of fact in the present case have done nothing wrong in saying, as they do in para. 2, sub-para. (*e*), that the competition of the brewers in their opinion justified the higher figure of value.

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(1) [1901] A. C. 179.

(2) Ibid. 182.

In my opinion, the cardinal fallacy in the adoption by the Divisional Court of the alternative stated in para. 2, sub-para. (*f*), and in Channell J.'s judgment in the *Bradford* case (1), which that sub-paragraph accurately expresses, is that it shuts out evidence which must in the very nature of the problem be vitally relevant. We all know how one financially strong buyer will put up the price of a security on the Stock Exchange and for the moment make a new market value. Demand must put up value and cannot be irrelevant to valuation. I therefore wholly disagree with the conclusion of Ridley J. in the *Bradford* case (2) that "the competition of brewers intending to use the premises as a tied house" ought to be excluded, because it "introduces an element not referable to the hereditament itself, but to some personal or temporary contract under which the business is to be carried on." Similarly, I disagree with the view of Channell J. expressed in the same case (3) that, although the competition of brewers for the use of the house as a tied house was admissible up to a point—namely, to the extent to which it would make persons who were not brewers increase their offers in "the market," yet over and above that figure it must be excluded. His ground was that this additional factor would introduce "reasons personal to the brewer" (3); but why is that a ground for disregarding their competition? Every motive in human conduct is personal and all demand is personal. I regard the whole reasoning of the case, which is sufficiently reproduced in the headnote, as misconceived and think the case was wrongly decided.

In so far as it was based on the decision in *Dodds* v. *South Shields Assessment Committee* (4) it is to be remembered that that case has been so criticized since as to have lost authority: see, for instance, the *Sculcoates* case (5) per Lords Davey and Morris. (6)

Reliance was also placed in the *Bradford* case (1) on *Sunderland Overseers* v. *Sunderland Union* (7) (decided in the

(1) [1898] 2 Q. B. 630.
(2) Ibid. 635.
(3) Ibid. 637, 638.
(4) [1895] 2 Q. B. 133.
(5) [1900] A. C. 150.
(6) Ibid. 155, 157.
(7) 18 C. B. (N. S.) 531.

Court of Common Pleas in 1865) as authority for the proposition that sums a tenant might pay " not by reason of the value of the premises but for reasons personal to himself ought not to be taken into account." I do not think that the *Sunderland* case (1) decision is any authority for that proposition as applied by the Divisional Court in the *Bradford* case (2); but, if it is, it was wrongly decided. In the *Sunderland* case (1) the valuation under discussion was of five breweries which owned a large number of tied public-houses, some of which were within the parish, some outside. The tied tenants had been assessed by the overseers as free tenants and the breweries had been assessed without regard to the value to the brewers of the tie. The Union Assessment Committee had raised the assessment of the breweries, but left the assessments of the tied tenants unaltered. The overseers of the parish appealed to quarter sessions against the assessments of the breweries. It was found as a fact that, by means of the ties, the breweries secured a large trade and were enabled to sell at higher prices. Erle C.J., in his judgment, took one brewery and one public-house tied to that brewery as a test and assumed that the gain to the brewery and the loss to the publican were equal. He also assumed that the aggregate of the two values continued the same after as before the tie. Both assumptions seem of doubtful economic validity. This latter aspect, apparently, was pressed by the Court on counsel for the Union and conceded by him. It thus appeared that the Union had acted illogically in not reducing the assessments of the public-houses when they raised the assessments of the brewers; and the report says this (3): " Under these circumstances, the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the respondents did not offer to maintain it. By that admission, the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied." The learned Chief Justice said this (1): "Here, the overseers have rated all the public-houses, as well as the brewery, according to the principles of the Assessment Acts; and, according to those principles, the publican would have to pay a rate both on the lower money payment and higher beer charge which he pays to the brewer, his landlord, under the contract. There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made, it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency and otherwise; and so it would be made apparent that it was an attempt to rate a profit of trade." With this judgment Montague Smith J. concurred. Byles J. started his dissentient judgment (2) by accepting the premises of the other two, that "no question arises as to the aggregate rateable value of the whole brewery concern, including in that expression both the brewery, properly so-called, and the restricted public-houses. The question is, how that rateable value should be distributed between the brewery itself and those restricted houses." In the result, he differed from his colleagues, because he thought that the value of the tie was taken from the public-house and transferred to the brewery. It is clear that this decision is no authority for excluding evidence of an existing demand from several competing brewers or for saying that it is not material from which valuers may reasonably infer that the house commands a rental of £X. It did not touch that question. Whether the views of the majority or that of Byles J. about the valuation of the brewery was right is, in my opinion, immaterial to the present appeal; but, anyhow, all the cases which I have cited are subsequent in date and most of them of higher authority.

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(1) 18 C. B. (N. S.) 531.

(2) [1898] 2 Q. B. 630.

(3) 18 C. B. (N. S.) 571.

It is unnecessary to analyse the judgment of the learned Lord Chief Justice in the present case, as it accepts the principles of Channell J.'s judgment in the *Bradford* case (3)

(1) 18 C. B. (N. S.) 576.
(2) Ibid 577.
(3) [1898] 2 Q. B. 630.

as binding and follows that decision. I need not say that I differ from that decision after his endorsement of it with the greatest hesitation, but, having formed a definite opinion, I must express it.

I now deal with the second issue in the appeal, that arising out of the contention that we are bound by authority to follow *Bradford* case (1) or alternatively that it has been so long treated as good law that we ought not to upset it: stare decisis. This alternative contention does not seem to me to have any weight in such a question as the present. In the *Bradford* case (1) there was evidence of a specific source of demand for the public-house from the brewers for the purpose of putting in a tied tenant. That demand was found as a fact to be sufficient to increase the value by some thirty per cent. The Court said that they must disregard it because the profit which was the motive for the demand would be made out of a personal contract. That conclusion was, in my opinion, radically inconsistent with a long chain of authorities. What is the proposition which it is contended should be treated as sacrosanct? I think the contention is unsound and that we should follow the principles laid down by Lord Wright in *City of Westminster* v. *Southern Ry. and W. H. Smith & Son, Ld.* (2) and the quotation from Lord Loreburn there relied upon.

As regards the other argument, that the *Bradford* case (1) decision has been approved by authority binding on us, I do not think it necessary to say much. The *Bradford* case (1) decision was mentioned by Hamilton J. in *Truman, Hanbury, Buxton & Co., Ld.* v. *Commissioners of Inland Revenue.* (3) That case depended on other statutes, the most relevant being s. 44, sub-s. 2, of the Finance (1909–10) Act, 1910, as to the "annual licence value" of licensed premises. In the course of his judgment Hamilton J. summarized the argument of the petitioners (4) and in the course of it mentioned the *Bradford* case (1), which had been cited by counsel, but he did not in any way endorse it. That reference cannot give it authority. In the Court of Appeal it was never mentioned. It was cited by counsel in the case of *Poplar Assessment Committee* v. *Roberts* (1), but for a wholly different purpose. In *Alfred Leney & Co., Ld.* v. *Whelan* (2) the brewers held a number of tied houses. These they leased to another brewery company for a term of years for an inclusive rent of 20,000*l.* The houses were assessed under Sch. A at an annual value of 5500*l.* The Inland Revenue claimed to be entitled to Sch. D tax on the difference. The House of Lords, affirming the Court of Appeal, decided in favour of the brewers. The *Bradford* case (3) was mentioned in the special case, but does not appear to have been referred to in argument. Lord Hanworth M.R., however, during his judgment (4) quoted this passage from the judgment of Channell J. (5): "I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally"; and then he himself added: "That means that the question should be considered whether the competition of brewers had raised the market value of the public-houses in the district." That is the right way in which this question of tie should be used. I do not think the learned Master of the Rolls had in mind the question before us to-day; nor was he expressing approval of the point in the decision which now concerns us. His citation of the case does not, therefore, affect us. There is, however, a passage in Romer L.J.'s judgment (6) which calls for consideration. He there says: "It is perfectly true that the fact that the brewer is willing to give a very much higher rent for a public-house, because of his anticipation, if he becomes lessee, of making very large profits from the supply of beer to the house, ought not to be taken into consideration in ascertaining

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(1) [1898] 2 Q. B. 630.

(2) [1936] A. C. 511, 563, 564.

(3) [1912] 3 K. B. 377.

(4) Ibid. 392–394.

(1) [1922] 2 A. C. 93, 97.
(2) [1934] 2 K. B. 511; [1936] A. C. 393.
(3) [1898] 2 Q. B. 630.
(4) [1934] 2 K. B. 511, 522.
(5) [1898] 2 Q. B. 630, 639.
(6) [1934] 2 K. B. 511, 571, 534.

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ROBINSON BROTHERS (BREWERS), LD. v. HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE.

Scott L.J.

the annual value for the purposes of Sch. A, but it by no means follows from that that the large rent which in the end he pays for the premises because of his anticipation of profits is not a rent in the true sense of the term." The learned Lord Justice seems in the first half of this sentence to be touching on the *Bradford* case (1), although he does not mention it; but the second half, I think, shows that his mind was not really on that case. The passage, therefore, does not affect our freedom to-day.

In my opinion, the respondents' argument that the *Bradford* case (1) has been made binding authority therefore comes to nothing.

There is only one other aspect I need mention. Counsel for the respondent company relied on certain cases decided under other statutes, such as *Truman, Hanbury, Buxton & Co., Ld.* v. *Commissioners of Inland Revenue* (2), decided under ss. 43 and 44 of the Finance (1909–10) Act, 1910; *Inland Revenue Commissioners* v. *Clay* (3), decided under s. 25, sub-s. 1, of the same Finance Act; *Whelan* v. *Alfred Leney & Co., Ld.* (4), to which I have already referred, in which the valuation of public-houses for Sch. A income tax was discussed; and, lastly, *Commissioners of Inland Revenue* v. *Crossman* (5), a case upon s. 7 of the Finance Act, 1894. The questions there raised are necessarily not the same question as that raised here; but, so far as they have any bearing upon it, I am of opinion that they support the view expressed by me in this judgment, and I do not think it necessary or useful to discuss them in detail.

I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Richardson, Sadler & Co., for Hannay & Hannay, South Shields.*

Solicitors for respondents: *Godden, Holme & Ward.*

(1) [1898] 2 Q. B. 630.
(2) [1912] 3 K. B. 377.
(3) [1914] 3 K. B. 466.
(4) [1934] 2 K. B. 511; [1936] A. C. 393.
(5) [1935] 1 K. B. 26; [1937] A. C. 26.

J. R.

In re TAXATION OF COSTS.

C. A.

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May 7.

In re T. A. M.—A SOLICITOR.

Costs—Taxation—Insurance against third-party risks—Action by assured dismissed—Counterclaim by defendants successful—Assured's solicitor's costs—Division as between assured and underwriters—Application by underwriters for taxation by registrar of county court—Jurisdiction of registrar to tax—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 118*—County Court Rules,* 1903 *to* 1935, *Order* LIII., *r.* 49.

Lloyd's underwriters by a policy insured the owner of a motor-car against third-party risks, but the policy did not cover damage to the assured's own car. The assured had a collision with a motor lorry in which both cars were damaged. The assured brought an action against the owners of the motor lorry to recover the damage done to his motor-car. The owners of the motor lorry counterclaimed for the damage to their motor lorry. Notice of that counterclaim was given to the underwriters' agents. At the trial in the county court judgment was given against the assured and in favour of the owners of the motor lorry on their counterclaim.

The assured's solicitor drew up his bill of costs in respect of the plaintiff's claim and in defending the defendants' counterclaim, and proposed that the underwriters should pay two-thirds of the total bill of costs and the assured the remaining one-third. The underwriters' agents objected to the proposed division of liability. The registrar was accordingly asked to tax the bill of costs as between the underwriters' agents and the plaintiff's solicitor. The registrar decided that plaintiff's solicitor's division of liability for his costs was correct. The underwriters' agents applied to the county court judge to review the taxation, but he upheld the registrar's decision.

On appeal by the underwriters' agents:—

Held, that the registrar had only jurisdiction to tax costs as between parties to the litigation on the record or as between one party to the litigation on the record and his solicitor; and that the registrar had no jurisdiction to tax costs as between some one who was not a party to the litigation and the solicitor of a party to the litigation.

APPEAL from the Ross County Court.

Certain Lloyd's underwriters on July 1, 1936, issued a policy by which they insured a Mr. Scudamore against third-party risks in connection with his motor-car. The policy contained the usual clause that the underwriters would pay all legal charges and expenses incurred with their written consent in

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dealing with or defending any claim against the assured "which may be the subject of indemnity in this policy, and the underwriters will also at their sole option arrange to pay the fee of a solicitor to represent the assured and his driver." The policy did not cover any damage to the assured's own car. The underwriters appointed the Renown Insurance Association, Ld., as their agents to deal with claims and notified that fact on the policy.

There was a collision on July 1, 1936, between Mr. Scudamore's motor-car and a motor-car or lorry belonging to the Power Petroleum Co. No notice of this collision was given to the Renown Insurance Association, Ld. Mr. Scudamore on August 7, 1936, brought an action in the county court against the Power Petroleum Co. to recover 40*l.* as the damage to his motor-car by reason of the collision. The Power Petroleum Co., besides delivering a defence denying their liability to the plaintiff in respect of the damage to his motor-car, also counterclaimed for 80*l.* as the damage done to their motor-car or lorry by reason of the collision; these damages were subsequently agreed at 65*l.* As this counterclaim was a claim by a third party, notice of the counterclaim was given by the plaintiff's solicitor to the Renown Insurance Association, Ld., who, on September 6, in acknowledging the receipt of the notice, asked the plaintiff's solicitor, as the trial of the action and counterclaim would take place within a very few days, to protect their interests. At the trial of the action on September 11 the county court judge dismissed the plaintiff's claim and gave judgment for the defendants on their counterclaim for 65*l.* and costs. The underwriters were liable under their policy for that amount.

The plaintiff's solicitor then drew up his bill for the plaintiff's costs in bringing his claim and in defending the defendants' counterclaim, and proposed that the plaintiff should pay one-third of the total amount of the bill, and that the underwriters should pay the remaining two-thirds. The Renown Insurance Association, Ld., however, objected to the proposed division as to liability for the plaintiff's solicitor's costs and said they were not liable for any of the costs of the claim, but only for defending the defendants' counterclaim. The registrar of the county court was accordingly asked to tax the bill of costs as between the Renown Insurance Association, Ld., and the plaintiff's solicitor, the plaintiff not being present at the taxation. The registrar decided that the plaintiff's solicitor's division of liability for his costs was correct. The Renown Insurance Association, Ld., applied to the county court judge to review the taxation, but he upheld the registrar's decision.

The Renown Insurance Association, Ld., appealed.

Stephen Chapman for the appellants. The taxation of this bill of costs proceeded upon a wrong principle, and therefore the order of the registrar and of the county court judge ought to be set aside.

[GREER L.J. What right had the insurance company to tax the costs of the assured's solicitor? They were not parties to the litigation.]

The appellants were entitled to tax the bill of costs of the assured's solicitor as that solicitor considered the insurance company to be his clients with regard to the counterclaim after the letter of September 6 from the insurance company.

A. A. Warren for T. A. M., solicitor, respondent. Under s. 118 of the County Courts Act, 1888: "All costs and charges between solicitor and client shall, on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party . . . ." Under Order LIII., r. 49, of the County Court Rules, 1903 to 1935: "Any party who may be dissatisfied with the allowance or disallowance by the registrar of any item or part of an item in any costs taxed by him may . . . . apply to the judge . . . . to review the taxation." The Renown Insurance Association, Ld., was a client and party within the meaning of that section and Order.

GREER L.J. In this case we are of opinion that the registrar of the county court ought to have refused to make any order settling the proportions to be paid as between the Renown Insurance Association, Ld., and the defendant to the proceedings. The position was a little odd. The plaintiff brought an action against the defendants in order to recover for damage to his motor-car. So far as his claim was concerned he was not covered by any policy of insurance in respect of damage to his own car, but he brought an action against the defendants, the owners of a car or a lorry with which his car came into collision. The lorry or car owners, being a third party as between the plaintiff and the insurers, counterclaimed for damages for the damage to his car. The damages were agreed at 65*l.* and the action and the counterclaim came on for trial. The action was decided against the plaintiff and in favour of the defendants, claiming on their counterclaim. The liability on the counterclaim was covered by insurance by a Lloyd's policy. Under that policy there was the usual clause that the underwriters would pay all legal charges and expenses incurred with their written consent in dealing with or defending any claim against the assured " which may be the subject of indemnity in this policy, and the underwriters will also at their sole option arrange to pay the fee of a solicitor to represent the assured and his driver." They do not say they will conduct the litigation themselves, that they will become defendants to the claim or plaintiffs in respect of a claim, but that they will pay a solicitor to represent the assured. The only parties to the litigation on the counterclaim are the nominal parties to the counterclaim in this case. Nobody else can, in my judgment, come to the registrar or the judge to ask for a taxation of his costs. We have been referred to s. 118 of the County Courts Act, 1888, which certainly gives power, in the latter part of the section, to the registrar, subject to review by the judge, to tax the costs of the parties to the action as between solicitor and client if they desire to have their costs taxed as between solicitor and client and not merely taxed as between party and party. But to my mind it is quite clear and beyond the possibility of controversy that that refers not to the taxation of costs as between third parties who are technically behind the parties to the litigation, but who are not in fact parties to the litigation, but it only empowers the registrar to deal with the taxation as between party and party and, if so asked by either of the parties to the litigation, to tax the costs as between solicitor and client. The idea that the registrar can tax the costs as between a third party, who is not a party to the litigation, is to my mind an impossible contention as to the meaning of the section in question. It might just as well have been said that if there was some friend helping out of charity one or other of the parties to the litigation that that person could come in and say: "I am going to pay the costs which have been incurred by the plaintiff or the defendant as the case might be and therefore please, Mr. Registrar, tax the costs as between me and the solicitor whom I have appointed to represent one of the parties to the litigation." That seems to me to be an impossible position and there ought to be no doubt whatever that what was done by the registrar was not within the powers of the registrar. Therefore, in effect, though the appellants fail to establish the proposition they wanted to establish—namely, that the taxation was upon the wrong principle, they are entitled to say, and we are bound to say, that the order of the registrar and of the judge must be set aside. But inasmuch as both parties concurred in asking the registrar to do something which he had no power to do, we think the appeal should be allowed and the decision of the registrar and of the county court judge set aside and that there should be no costs on either side.

SLESSER L.J. I agree and would only add in confirmation of what has been said by my Lord that Order LIII., r. 49, of the County Court Rules, 1903 to 1935, dealing with the review of the taxation by the judge commences thus: "Any party who may be dissatisfied with the allowance or disallowance by the registrar of any item or part of an item in any costs taxed by him may . . . . apply to the judge . . . . to review the taxation." It is abundantly clear to my mind that that order and the rule dealing with the application to the registrar himself properly following upon s. 118 of the County Courts Act, 1888, are dealing with taxations as between parties. The question in this case, as stated by the learned judge, was what portion of the bill of costs of the solicitor who was acting for the plaintiff should be paid by the Renown Insurance Association, Ld. That is a question quite outside any question which can possibly arise under s. 118. I agree that neither the registrar nor the judge had any jurisdiction to deal with the matter the subject of this appeal at all.

MACKINNON L.J. I agree and I will only add a word or two in case this sort of practice has become at all common, because if it has I regard this as a matter of some importance. For a century or more underwriters have in reality been the parties interested in most litigation about ships, very often on both sides. In these days the practice of insurance has spread to other objects, especially vehicles propelled by internal combustion engines, and I should not be surprised to be told that in possibly 50 per cent. of all actions in the King's Bench Division underwriters are on one side or the other the interested parties behind the nominal plaintiff or defendant. The duty of the Taxing Master, either in the county court or in the High Court, is to tax costs as between the parties to the litigation on the record, or between one party to the litigation on the record and his solicitor. That is a difficult and troublesome task. I think it would be intolerable if there was cast upon the Taxing Master the further task, not of settling any question of taxation, but of construing the terms of an insurance policy so as to decide the liability of the underwriter and the distribution of the burden of the costs as between the party to the action and his underwriters. That depends upon the terms of the policy, and if a dispute arises, it can only be resolved in an action on the policy. Quite apart from the fact that for these reasons I think there was no power in the registrar to entertain this application at all, it was further grossly irregular inasmuch as he allowed the application to be made by a corporation called the Renown Insurance

Association, Ld., which had no contractual relation to Mr. Scudamore. They had no position at all except as agents of the underwriters. The irregularity ended in the registrar making an order that there was a certain liability on the Renown Insurance Association, Ld., which obviously was never under any liability at all in regard to those costs. Moreover that order, which incidentally taxed Mr. Scudamore's costs as between him and his solicitor, was made in the absence of any one representing him. The whole thing appears to me to have been not merely beyond any jurisdiction of the registrar, but in those respects grossly irregular.

The order as drawn up was :

Appeal allowed, orders of judge and registrar in so far as they purport to apportion costs after taxation between the plaintiff Scudamore and the Renown Insurance Association, Ld., set aside : the other orders of the registrar taxing costs on claim and counterclaim as between Scudamore and the Power Petroleum Co. to stand. No costs of appeal or below.

Solicitors for Renown Insurance Association, Ld. : *L. Bingham & Co.*

Solicitor for respondent : *T. A. Matthews, Hereford.*

R. F. S.

C. A.
1937
April 23;
May 11.

MERCANTILE UNION GUARANTEE CORPORATION, LIMITED *v.* BALL.

Infant—Carrying on business of haulage contractor—Hire purchase agreement of motor lorry—Claim for arrears due under agreement—Defence of infancy—Whether contract for benefit of infant.

An infant, aged twenty, who carried on business as a haulage contractor, entered into a hire purchase agreement for the purchase of a motor lorry to be used in his business. When sued for arrears of instalments due under the hire purchase agreement, he set up the defence of infancy. The county court judge found that the contract was not for the benefit of the infant and that the defence of infancy succeeded. On appeal:—

Held, that the contract was not one of the class by which an infant could be bound, and further that the Court could not differ from the view of the county court judge that a contract for a large and expensive lorry on onerous hire purchase terms was not a contract for the benefit of the infant.

Cowern v. *Nield* [1912] 2 K. B. 419 applied.

Appeal from a decision of His Honour Judge Ruegg in the Hanley County Court.

The action was brought by the plaintiffs to recover a sum of 96*l*. 7*s*. 6*d*. arrears due under a hire purchase agreement in respect of a motor lorry. The total price of the lorry was 666*l*. The terms of the hire purchase agreement were those common in such contracts. The defendant was at the time of making the contract an infant, being aged twenty. He had been carrying on business as a haulage contractor for about two years. He got into financial difficulties and fell into arrears with his instalments. When he was sued he raised the defence (inter alia) of infancy.

The county court judge found that the contract was not for the benefit of the infant, and that the defence of infancy succeeded.

The plaintiffs appealed.

H. E. R. Boileau for the appellants. The decision of the county court judge in holding that this contract was a trading contract was wrong. It enabled the defendant to carry on the trade of a haulage contractor which was his only means of livelihood. The defendant could not have had a lorry with which to carry on his business except on a hire purchase agreement. At the time the defendant entered into the hire purchase agreement it was for his benefit as it enabled him to make increased profits, and the fact that he subsequently ceased to be able to make profits was merely owing to the imposition at a later date by the Government of an increased tax on heavy oil. A motor lorry comes within the definition of necessaries which now include everything necessary to enable an infant to earn a living. A motor lorry is a tool of trade for a haulage contractor. It was held in *Chapple* v. *Cooper* (1) that an infant widow was bound by her contract for the burial of her husband as being a contract for her own personal benefit. In *Clyde Cycle Co.* v. *Hargreaves* (2) it was held that a racing bicycle might be a necessary for an infant apprentice. It was held in *Walter* v. *Everard* (3) that contracts of apprenticeship stand on the same footing as contracts for necessaries so that an infant was liable for necessary instruction duly provided for him under an apprenticeship deed in the same way as for ordinary necessaries supplied to him. In that case Lord Esher M.R. said (4): " Then what are necessaries for an infant? Food and clothing always are necessaries, if the infant cannot obtain them in any other way. Is education a necessary for an infant? Looking at it independently of authority, I should say that education in a trade with a view to making an infant a useful citizen must always in this working country have been thought of the greatest importance, and must always have been considered a necessary for an infant." Lord Coke in Coke upon Littleton, 172*a*, said that " An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards." In *Clements* v. *London & North Western Ry. Co.* (5) Kay L.J. said: " It has been clearly held that contracts of apprenticeship and with regard to labour

(1) (1844) 13 M. & W. 252.
(2) (1898) 78 L. T. 296.
(3) [1891] 2 Q. B. 369.
(4) [1891] 2 Q. B. 374.
(5) [1894] 2 Q. B. 482, 491.

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are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the Court before which the question comes will not allow the infant to repudiate it." Fry L.J. in *De Francesco* v. *Barnum* (1) said: "Where you get a contract for labour and you have a remuneration of wages, that contract, I think, must be taken to be, prima facie, binding upon an infant. At any rate it is plain that the contract by which an infant binds himself to learn an art or a trade to his own future profit is, prima facie, valid and binding." In *Roberts* v. *Gray* (2) it was held that a contract into which an infant entered to go on a tour as a professional billiard player was for necessaries and for the infant's benefit and therefore binding upon him. It was held in *Cowern* v. *Nield* (3), upon which case the county court judge relied, that a trading contract entered into by an infant was not enforceable against him even though it was for his benefit. That case is distinguishable from the present case, because here the contract for the hire of the motor lorry was not a trading contract but a contract to enable the infant to carry on a business and so enabling him to earn a living. The latest case on the subject is *Doyle* v. *White City Stadium, Ld.* (4), where it was held that a contract made by an infant boxer with the Board of Control was binding on the infant as it was closely connected with a contract as to employment, and on the whole was for the infant's benefit.

F. T. Atkins for the respondent. The decision of the county court judge was correct. He decided two things, first, that this motor lorry was not a necessary for the infant defendant, and secondly, that the contract for the hire purchase of the motor lorry was not for the benefit of the infant. It is necessary to consider the whole of the terms of the contract by which very onerous terms were put upon the infant. An infant can never be bound by a hire purchase agreement by reason of its instability and the onerous nature of its terms. The transaction was really one by which the plaintiffs lent the money to the infant defendant to enable him to buy the lorry from dealers. It was not for the infant's benefit to enter into this hire purchase agreement. It was held in *Fawcett* v. *Smethurst* (1) that though the hiring of a car by an infant at taxi-cab rates and on reasonable terms for the purpose of driving to a place six miles off to fetch his bag might be a necessary, it would not be so if the contract of hiring contained an onerous term, such as that the car should be at the infant's risk. In the present case the infant defendant agreed to be responsible for all risks to the lorry. This contract was an ordinary trading contract on which an infant cannot be held liable. Phillimore J. said in *Cowern* v. *Nield* (2): "I am satisfied from the authorities which have been cited to us that the only contracts which, if for the infant's benefit, are enforceable against him are contracts relating to the infant's person, such as contracts for necessaries, food, clothing, and lodging, contracts of marriage, and contracts of apprenticeship and service. In my opinion a trading contract does not come within that category." Bray J., in the same case, said (3): "In my opinion there is no authority for saying that a trading contract, even if for the benefit of the infant, is an exception to the rule that an infant is not, except in certain cases, liable on contracts made by him."

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(1) (1890) 45 Ch. D. 430, 439.

(2) [1913] 1 K. B. 520.

(3) [1912] 2 K. B. 419.

(4) [1935] 1 K. B. 110.

H. E. R. Boileau replied.

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1937. May 11. The judgment of the Court, consisting of Scott L.J. and Finlay J., was read by Finlay J.

FINLAY J. This is an appeal from a judgment of Judge Ruegg given in the Hanley county court. The action was brought by the plaintiffs claiming a sum of 96*l*. 7*s*. 6*d*., arrears due under a hire purchase agreement in respect of a motor lorry. The total price of the lorry was 666*l.* It is unnecessary to refer in detail to the terms, which were those common in such contracts.

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(1) (1914) 84 L. J. (K. B.) 473.
(2) [1912] 2 K. B. 419, 422.
(3) [1912] 2 K. B. 424.

The defendant was, at the time of the making of the contract, an infant, being aged twenty. He had been carrying on business as a haulage contractor for about two years. He got into financial difficulties and fell into arrears with his instalments. Being sued he raised two defences, but to one only of these—that of infancy—is it necessary here to refer. The learned judge has held that this defence succeeded and we think that he was right in so holding.

The law on this matter has been discussed in many cases. The position is thus stated in Coke upon Littleton, p. 172*a*: " An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards." To this enumeration some addition has in the course of years been made, particularly, as pointed out by Slesser L.J. in *Doyle* v. *White City Stadium, Ld.* (1), with reference to contracts of service. Our attention was drawn to several modern cases: *Walter* v. *Everard* (2); *Clements* v. *London & North Western Ry. Co.* (3); *Cowern* v. *Nield.* (4) In this last case the law is thus laid down by Bray J. (5): " It is true that there are certain contracts which, if they are for the infant's benefit, can be enforced against him; and it is said this trading contract was for the benefit of the infant because it was for the benefit of the infant that he should learn how to carry on a trade. But in my opinion there is no authority for saying that a trading contract, even if for the benefit of the infant, is an exception to the rule that an infant is not, except in certain cases, liable on contracts made by him." The most recent case appears to be *Doyle* v. *White City Stadium, Ld.* (6)

Applying the law laid down in these cases it seems to us in the first place that this contract is not one of the class by which an infant can be bound. It is not a contract for necessaries within the enumeration of Lord Coke. Nor is it a contract of service or apprenticeship or analogous to any of these. But there is a further and in our view an insuperable difficulty in the plaintiffs' way. The contract must be not only within the class of contracts by which an infant may be bound, but it must be one beneficial to the infant, and whether it is so is a question to be decided on the facts of each particular case. The judge here has found that the contract was not for the benefit of the infant. Even if it be assumed, contrary to our view, that the contract is one of the class by which an infant could be bound, we find it quite impossible to differ from his view that a contract for a large and expensive lorry on onerous hire purchase terms was not a contract for the benefit of the infant.

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(1) [1935] 1 K. B. 110, 131.
(2) [1891] 2 Q. B. 369.
(3) [1894] 2 Q. B. 482.
(4) [1912] 2 K. B. 419.
(5) Ibid. 424.
(6) [1935] 1 K. B. 110.

For these reasons we are of opinion that the judgment of Judge Ruegg was perfectly correct, that it should be affirmed and this appeal dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *G. H. Drury.*
Solicitor for respondent: *Thos. Bagley, Stone, Staffs.*

R. F. S.

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April 26; *May* 11.

UNSWORTH *v.* PEASE AND PARTNERS, LIMITED.

Workmen's compensation—Basis of calculation—"Average weekly earnings"—Concurrent contracts of service—Collier also "checkweigher" at mine—Also collecting subscriptions from members of Union—Coal Mines Regulation Act, 1887 (50 *&* 51 *Vict. c.* 58), *ss.* 12, 13, 14—*Coal Mines* (*Weight of Minerals*) *Act,* 1905 (7 *Edw.* 7 *c.* 9), *s.* 1, *sub-ss.* 3, 5—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 10 (*ii.*).

A workman in addition to his employment by a colliery company as a collier at the coal face acted as a checkweigher at the mine under the Coal Mines Regulation Act, 1887. On these occasions he was paid for each day he was so engaged a day's wage out of the checkweigh fund, a fund contributed to by his fellow workmen in the mine. He also was employed as a branch official of his local trade union to collect subscriptions of members, for which he received remuneration. On the days on which he was engaged in one or other of these capacities he was absent from the mine with the consent of the colliery company, but received no payment from them. The workman, having met with an accident arising out of and in the course of his employment, commenced proceedings for compensation, and claimed that the amount received in respect of the foregoing employments ought to be taken into account in estimating the amount of his weekly earnings. The county court judge made an award in favour of the workman on the basis of the compensation claimed. On appeal by the employers:—

Held, that the payments were made to the workman in respect of concurrent contracts of service within the meaning of s. 10 (ii.) of the Workmen's Compensation Act, 1925, and therefore he was entitled to have them taken into account in computing the amount of his average weekly earnings as a collier.

Wild v. *John Brown & Co., Ld.* [1919] 1 K. B. 134 distinguished.

APPEAL of the employers from an award of His Honour Judge Banks sitting at the Thorne (Yorkshire) County Court as an arbitrator under the Workmen's Compensation Act, 1925.

The workman, a collier, was injured by an accident in the Thorne Colliery on May 29, 1936. He was totally incapacitated, and was paid compensation at the rate of 18*s.* 9*d.* per week for total incapacity to July 31, 1936. This sum was based on his average of weekly earnings before the accident of 1*l.* 4*s.* 8*d.* He had now completely recovered.

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The workman's case was that during the previous twelve months he earned, besides his wages as a collier at the coal face (1*l.* 4*s.* 8*d.* per week), (*a*) 65*l.* 5*s.* 8*d.* for twelve months as sub-checkweighman at the colliery and (*b*) 9*l.* 15*s.* 5*d.* as a local or branch official of the Thorne Branch of the Yorkshire Mine Workers' Association by way of remuneration for collecting subscriptions from members. These sums, he claimed, should be taken into account in arriving at his pre-accident earnings, under s. 10 (ii.) of the Workmen's Compensation Act, 1925, because they were earned in pursuance of concurrent contracts of service, within the meaning of that section.

The terms of the workman's employment were that he should be paid by the employers the current rate of wages for the amount of work which he did as a collier. He was allowed time off by the employers to act as checkweighman and to collect subscriptions for his union on Fridays. For the time occupied by him in carrying out those two duties he was not paid by the employers, but was paid in the one case out of the checkweigh fund contributed to by the coal face workers in the mine and in the other by his union.

The employers contended that neither as a checkweighman nor as a trade union official was the workman acting in pursuance of a contract of service. As a sub-checkweighman he was performing a statutory duty in which he had to use his own judgment and experience, and was not subject to control by any person or persons as to the manner of doing his work. As a trade union official they contended that he collected subscriptions in his capacity as branch delegate, and again free from control as to the manner in which he performed the task, and they relied on *Wild* v. *John Brown & Co., Ld.* (1)

The county court judge held that when the workman was collecting the subscriptions on behalf of his branch, the relation of master and servant in fact subsisted between him and the branch and that he was acting in pursuance of a contract of service. As regarded the position of checkweighmen

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(1) [1919] 1 K. B. 134.

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he held that the evidence was conclusive as to the question of control and showed quite definitely that not only were checkweighmen appointed by, and paid by, and dismissible by, and insured by, and their cards stamped by those subscribing to the fund, but that the subscribers through their properly elected committee and secretary issued from time to time definite instructions to checkweighmen affecting not only the times at which they should do certain work but what they should do, and the way in which they should do it, for the purpose of obtaining correct weights, and safeguarding the interests of the subscribers. He accordingly held that the sums earned by the workman (i.) as a collector of subscriptions and (ii.) as a sub-checkweighman should be brought into account in ascertaining his real pre-accident earnings, and it was agreed, if that was so, that compensation at the full rate was payable for the agreed period.

The employers appealed. The appeal was heard on April 26, 1937.

F. W. Beney for the appellants.
John Neal for the respondent.

The arguments sufficiently appear from the judgment of Greene M.R.

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1937. May 11. Greene M.R. I am authorized by Romer L.J. to say that the judgment which I am about to read is one which has his complete agreement.

The dispute in this case relates to the calculation of the respondent's pre-accident earnings. He was totally incapacitated by an accident which happened to him while working as a collier in the appellants' mine, and in respect of this accident he was paid during the incapacity a sum of 18*s.* 9*d.* per week based on his average weekly earnings as a collier, which were 1*l.* 4*s.* 8*d.* a week. He claims that his average weekly earnings ought to have been computed by reference not to his earnings as a collier alone but to those earnings and certain other earnings which he claims to have received under concurrent contracts of service within the meaning of s. 10 of the Workmen's Compensation Act, 1925. That section provides that : " For the purposes of the provisions of this Act relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed : . . . . (ii.) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident."

These other earnings were his earnings as sub-checkweighman at the colliery and his remuneration for collecting subscriptions from members of his union. The sums earned under these two heads during the relevant period of twelve months were 65*l.* 5*s.* 8*d.* and 9*l.* 15*s.* 5*d.* respectively.

The county court judge has held that the earnings under each head were earnings under a concurrent contract of service, and the only question which arises on this appeal is whether or not he was right in so holding.

I will deal first with the respondent's earnings as a sub-checkweighman. The position would have been the same if he had been the checkweigher, and I shall so treat the matter.

As the name implies, the primary function of the checkweigher is to check the weights of coal brought to the surface in order to ensure that colliery workers who are paid by weight receive the full amount of wages to which they are entitled. This is a task which the workers themselves are for obvious reasons unable to perform and accordingly it is necessary that some one should be employed to do it for them. This could of course be arranged by agreement with the colliery proprietor. A person so appointed would be employed by the colliery workers appointing him, and if the

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terms of the contract of employment fell to be inferred from the mere circumstance that he was appointed checkweigher on their behalf at a certain remuneration, the contract would, in my opinion, clearly be a contract of service. There is nothing in the nature of the work or the relationship of the parties to the contract which would tend to negative the existence of those powers of control which are characteristic of a contract of service.

But it was found unsatisfactory to leave colliery workers without a statutory right to protect their interests by appointing a checkweigher, and such a right was first given to them by s. 18 of the Mines (Coal) Regulation Act, 1872. It is not necessary to state the provisions of that section, since they are substantially repeated in the Coal Mines Regulation Act, 1887, s. 13, to which I will refer presently. There is one point, however, to be noted, that under s. 18 of the Act of 1872 the checkweigher had to be one of the persons employed in the mine or in some other mine belonging to the owners. It was held under this provision that a checkweigher appointed by the men ceased to be employed by the owners and "entered upon a new employment, which was an employment by the men." This is the language of A. L. Smith J. in *Hopkinson* v. *Caunt* (1), and it is significant that the same learned judge described the contract with the men into which the checkweigher entered upon his appointment as "a contract of service." This, in my respectful opinion, is an accurate description of the relationship. A worker in the mine is taken from the mine and employed to do work by his fellow workers, the nature of the work being such that any workman in the mine could perform it.

The Coal Mines Regulation Act, 1887, in substance re-enacted s. 18 of the Act of 1872; but it added certain machinery to provide for the fact that the workers in a mine are, or may be, a shifting population. These provisions relate to the remuneration of the checkweigher, which he is empowered to recover proportionately from any person for the time being employed at the mine and paid by weight in cases where he has been appointed by the majority on a ballot. This provision is, in my opinion, a mere piece of machinery which does not affect the nature of the contract. In cases where the appointment is not made by a majority on a ballot, the position is left untouched and the checkweigher must look for his remuneration to the individuals who appointed him. Sect. 14 itself refers to the remuneration of a checkweigher as "wages or recompense," and the use of the word "wages" is, I think, at any rate an indication of the way in which the Legislature regarded the nature of the contract.

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(1) (1885) 14 Q. B. D. 592, 596.

The Act of 1887, while making a special provision for the case of interference by the checkweigher with matters with which he is not concerned, did not make any provision for removal of the checkweigher by his fellow workers. Provision for that has never been expressly made by statute. The right of the workers on whose behalf the checkweigher is employed to remove the checkweigher is, however, impliedly recognized, since by sub-s. 5 of s. 1 of the Coal Mines (Weight of Minerals) Act, 1905, it is provided that where a checkweigher is appointed by a majority on a ballot he can only be removed by a majority ascertained by ballot of the persons employed and paid by weight at the time of removal. This leaves it competent to the workers who appoint a checkweigher otherwise than by a majority ascertained by ballot to remove him. The same section by sub-s. 3 provides that where a checkweigher is appointed by such a majority on a ballot he is to be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him.

It was this Act that provided for the appointment of deputy checkweighers (sometimes called "sub-checkweighmen"), who for all relevant purposes are in the same position as checkweighers.

It is said on behalf of the appellants that the office of checkweigher is a statutory office the nature of which is to be ascertained solely from the relevant statutory provisions. Reliance is placed on the special provisions with regard to removal of checkweighers and their payment, to which I have referred, and it is said that these provisions make it impossible to treat the relationship between the checkweigher and the men for whom he acts as one of employment under a contract of service. I am unable to accept this argument. The provisions in question are, in my opinion, merely statutory machinery specially provided in order to enable obvious practical difficulties to be overcome and do not affect the substantial nature of the relationship. Reliance is also placed on the language of sub-s. 1 of s. 13 of the Act of 1887, which describes the function of the checkweigher as those of taking an agreed account of the weight of the mineral or determining correctly the deductions as the case may be. The deductions in question are those referred to in s. 12 in respect of foreign substances or improper fillings, and under that sub-section the deductions are to be determined in a manner agreed between the colliery owner and the workers affected or, in default of agreement, in the case where there is a checkweigher at the mine, by a person appointed by the owners and the checkweigher. If these two disagree, then a third person mutually agreed or in default of agreement appointed by a chairman of quarter sessions is to determine the mode of deduction.

Now it is said that the position and functions of the checkweigher are exhaustively stated in s. 13, sub-s. 1, and that he is merely a person with a statutory duty to perform or with statutory powers to exercise in respect of the matters indicated in the sub-section. It is further said that his functions in determining the mode of deduction are arbitral or quasi-arbitral in their nature and are not such as can be referred to a contract of service. In this connection reliance was placed on the decision of this Court in *Wild* v. *John Brown & Co., Ld.* (1) That case decided (among other things) that a miner appointed by his fellow workmen to inspect the mine under s. 16 of the Coal Mines Act, 1911, is not entitled to have included in the assessment of his average weekly earnings remuneration received from them for discharging his duties under that section. The section empowers the workmen employed in the mine to appoint two of their number to inspect the mine. The persons so appointed are to have full powers of inspection and they are under a statutory obligation to make and sign a full and accurate report of the result of their inspection. It was held that a person so appointed does not enter into a contract of service with the men appointing him, the reason being that the duties imposed upon him are to be exercised under the statute in accordance with his own judgment unfettered by any instructions from those employing him. The case upon this point turned entirely upon the nature of the inspector's statutory duties.

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(1) [1919] 1 K. B. 134.

In the case of a checkweigher I can find nothing in the language of the relevant statutes which has the effect of putting the checkweigher in a position where he would be free from that control by the persons appointing him to which he would be subject if he were appointed (as by agreement with the colliery owner he well might be) independently of the statutory power of appointment. The work which the checkweigher performs appears to me in its nature to admit of complete control by the workers for whom he acts, and this is a matter with which the statutory provisions have no concern. All that those provisions do is to give the workers the right to appoint their checkweigher, to ensure that when he is appointed no obstacle shall be placed in his way by the mine-owner, and to provide special machinery to enable him when not appointed by a defined group of men but by a majority on a ballot to recover his remuneration from those who enjoy the benefit of his services notwithstanding the fact that they are or may be a shifting population.

The special powers of the checkweigher with regard to determining the mode in which deductions are to be made do not in my opinion alter the essential character of the contract. In exercising those powers he merely takes the place of the men on whose behalf he is acting, and I can find nothing in the language of s. 12, sub-s. 1, of the Act of 1887 which places the checkweigher when exercising his powers in an arbitral or quasi-arbitral position or prevents him from acting in accordance with directions given to him by the men. The sub-section merely provides machinery for arriving at agreement in a more convenient way than by negotiation with a large body of workmen.

The remaining question relates to the remuneration received by the respondent for collecting subscriptions from the members of his union employed at the mine. The county court judge held that in respect of this work the relation of master and servant subsisted between the respondent and the branch of the union to which he belongs and that consequently the remuneration in question was received under a concurrent contract of service. I agree with the result but not with the reason given by the county court judge, since in my judgment the contract was a contract not with the branch but with the union itself. Mr. Beney on behalf of the appellants very fairly agreed that if we came to the conclusion that there was a contract of service between the respondent and the union we should be at liberty so to hold notwithstanding the finding of the county court judge that the contract was with the branch.

In order to ascertain the nature of the employment it is necessary briefly to examine the relevant rules of the union. Under rule 4 the supreme government of the union is vested in a council to which each branch sends a delegate elected by the branch to serve for twelve months. The respondent is the delegate elected by his branch. Rule 28 provides for the conduct of branches by a committee of which the delegate is assumed to be a member; the business of the branch is to be transacted as directed by the rules and minutes of the general council. Contributions from members belong to the union and moneys collected by branches are under rule 42 to be paid over to the treasurer. Under rule 46 contributions are to be paid to the secretary or collectors at the appointed time and place; while under rule 31 (*b*) the necessary contribution books, cash books, etc., are supplied by the union to branches. Rule 69 provides that the scale of

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payment for organizing and collecting contributions shall be 3*s.* 6*d.* plus the district percentage; but the sum of 9*l.* 15*s.* 5*d.* in question in this case was received not under this rule but under rule 72. This latter rule is applicable wherever a day's work is lost by a member in order (amongst other things) to do any business of the union at the request and by the resolution of a branch meeting, and the remuneration payable is a "delegate's day wage." We are to assume in this case that the respondent when collecting subscriptions was acting under this rule, and the sum of 9*l.* 15*s.* 5*d.* represents payments made under it for lost days' work. The power of removal of officers of the union, including local officials, is vested ultimately in the council of the union under rule 41.

The practice in the respondent's branch of the union is for the officers of the branch and the members of the branch committee to take it in turns to collect subscriptions on Fridays. The collection is made by two men sitting in a hut, one of whom takes the money and marks the men's cards and the other books it. The work has nothing to do with that done by the respondent in his capacity as delegate; and the provision in rule 72 that he is to receive a delegate's day wage does no more than fix the measure of remuneration.

The effect of the rules, in my opinion, is that a member employed to collect subscriptions is employed by the union, the money which he collects is the union's money, the remuneration which he receives is paid out of funds belonging to the union, and it is the council of the union which has the power to dismiss him. He is no doubt selected for the work by the branch, but the work is business of the union (rule 72), and the branch in employing him is, in my opinion, acting on behalf of the union.

But although I differ from the county court judge in holding that the contract of employment is with the union and not the branch, I am in agreement with his view that the contract is a contract of service. The work is of a perfectly simple character, and it appears to me clear that the union either directly or through the branch committee has complete control over those who perform it with regard

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not only to what they are to do but also to the manner in which they are to do it.

Save in the respect which I have mentioned, I am on both points raised by the appeal in general agreement with the reasoning and conclusions of the county court judge in his careful judgment.

The appeal is dismissed with costs.

Scott L.J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

Solicitors for the respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

W. I. C.

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AVERY *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

SAME *v.* SAME.
HARRIS *v.* SAME.
SAME *v.* SAME.
BONNER *v.* SAME.
SAME *v.* SAME.
WATSON *v.* SAME.
SAME *v.* SAME.

Fatal accident—Four men killed in railway accident—Widow's claim to damages under the Employers' Liability Act, 1880*—Children's claims to compensation as dependants under the Workmen's Compensation Act,* 1925*—Both sets of proceedings maintainable—Basis of computing the damages and the compensation—Fatal Accidents Act,* 1846 (9 *&* 10 *Geo.* 5, *c.* 93), *ss.* 2, 3, 4*—Fatal Accidents Act Amendment Act,* 1864 (27 *&* 28 *Vict. c.* 95), *s.* 1*—Employers' Liability Act,* 1880 (43 *&* 44 *Vict. c.* 42), *ss.* 1, 3*—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 8, 29.

When a workman meets with a fatal accident in the course of his employment by reason of the negligence of a fellow workman so as to bring the case within s. 1 of the Employers' Liability Act, 1880, the widow can elect to maintain proceedings for damages under the Act of 1880, and the children can elect to maintain proceedings for compensation as dependants of the deceased workman under the Workmen's Compensation Act, 1925.

Kinneil Cannel & Coking Coal Co., Ld. v. *Waddell* [1931] A. C. 575 followed.

But, if they have so elected, since the widow's proceedings must by virtue of s. 2 of the Fatal Accidents Act, 1846, be taken to have been brought for the benefit of herself and her children, she can only receive her proper share of the total damages as they are restricted by s. 3 of the Act of 1880. So too, as the widow was the dependant of the deceased workman, the children can only receive their proper share of the lump sum assessed as compensation for all the dependants under the Act of 1925.

Per Slesser L.J.: *Gill* v. *Fortescue & Sons, Ld.* (1913) 6 B. W. C. C. 577 not followed.

Per Romer L.J. and Luxmoore J.: *Gill* v. *Fortescue & Sons, Ld.*, distinguished.

APPEALS from the decisions of His Honour Judge Langman sitting at the Grantham County Court in the eight cases mentioned above.

On January 19, 1936, a collision occurred on the London and North Eastern Railway, near Grantham, as a result of two light engines overrunning the signals and crashing into a ballast train. At the time of the accident four workmen on the railway, who were being carried on the ballast train in the course of their work, sustained serious injuries from which they all died. Their names were Maurice Avery, Arthur Harris, George William Bonner and Augustin William Geoffrey Watson.

The eight sets of proceedings consisted of proceedings by the widows of the four men, Alice Avery, Jane Ellen Harris, Louise Bonner and Kate Alice Watson, claiming damages under the Employers' Liability Act, 1880, and the Fatal Accidents Acts, 1846 and 1864, for loss occasioned by the deaths of their respective husbands, and proceedings by the child or children of the four men, claiming compensation under the Workmen's Compensation Act, 1925, as dependants of the four men.

In the case of the deceased man Avery the widow recovered the maximum amount recoverable under the Employers' Liability Act, 1880—namely, three years' wages of a man in the same grade in the same employment as the deceased. This sum was 396*l.* The daughter, Eleanor Mary Avery, who was a partial dependant of the deceased was awarded 65*l.* compensation under the Workmen's Compensation Act, 1925. In the case of the deceased man Harris the maximum of the damages recoverable under the Act of 1880 was 438*l.*, and the widow recovered 380*l.* The children, Edward Harris, who was twenty-one years of age and a partial dependant when his father was killed, and Elsie Harris, who was then twelve years of age and a total dependant, were awarded 310*l.* compensation under the Workmen's Compensation Act, 1925. In the case of the deceased man Bonner the maximum amount recoverable was 389*l.*, and the widow recovered that amount. The children, George Raymond Bonner, who was sixteen years of age when his father was killed, and Betty Bonner, who was then thirteen years of age, both being partial dependants, were awarded 123*l*. 18*s*. under the Workmen's Compensation Act, 1925. In the case of the deceased man Watson the maximum amount recoverable was 526*l*. and his widow recovered 390*l*. The children, Doreen Watson, who was an adult when her father was killed and a partial dependant, and Margaret Watson, who was then eleven years of age, and Jean Watson, who was then nine years of age, both of whom were total dependants, obtained an award of 348*l*. 8*s*. under the Workmen's Compensation Act, 1925.

The main question of law argued in all these cases was whether it was possible for the widow of a deceased man to recover damages under the Fatal Accidents Acts, 1846 and 1864, and the Employers' Liability Act, 1880, and for the children to obtain compensation under the Workmen's Compensation Act, 1925. The question how the damages or compensation should be computed, if both proceedings were maintainable was also raised. The judgments of the county court judge dealing with these questions were delivered in the two Avery cases.

In the action by the widow the county court judge said that the action was brought by the widow alone, and the daughter Eleanor was not named in the proceedings as a dependant. The Employers' Liability Act, 1880, s. 1 (1), enabled "the legal personal representatives of the workman and any persons entitled in case of death," to avail themselves against his employers of any remedies under the Fatal Accidents Acts, where the injury resulting in death has been caused by the negligence of any person in the service of the employers who had control over a locomotive engine. By s. 3 the amount of compensation recoverable was not to exceed three years' estimated earnings of a workman in the same grade of employment as the injured workman. This sum was agreed at 396*l.* The Fatal Accidents Act, 1846, s. 2, enacted that the action should be for the benefit of the wife, husband, parent and child of the deceased (1) and provided in s. 4 (1) that particulars should be given of the person or persons for whom and on whose behalf such action was brought. The damages might be such sums as the Court might think proportioned to the injury resulting from the death to the parties respectively. The Fatal Accidents Act, 1864, s. 1 (2), enabled the claim to be made "by and in the name or names of all or any of the persons (if more than one) for whose benefit" the claim might have been made by an executor. Eleanor Avery, the daughter of the deceased, was bringing separate proceedings under the Workmen's Compensation Act. He found on the evidence that the servants of the defendant company who had charge of the locomotive were negligent and caused the injuries and subsequent death of Maurice Avery.

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(1) The Employers' Liability Act, 1880, s. 1: "Where after the commencement of this Act personal injury is caused to a workman . . . . (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any . . . . locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

Sect. 3: "The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."

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(1) Fatal Accidents Act, 1846 (Lord Campbell's Act), s. 2, provides: "And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportional to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find or direct."

Sect. 3: "Provided always, and be it enacted, that not more than one action shall lie for or in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve months after the death of such deceased person."

Sect. 4: "And be it enacted that in every such action the plaintiff on the record shall be required, together with the declaration to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

(2) Fatal Accidents Act, 1864, s. 1: "If and so often as it shall happen at any time or times hereafter, in any of the cases intended and provided for by the said Act [the Act of 1846], that there shall be no executor or administrator of the person deceased, or that there being such executor or administrator no such action as in the said Act mentioned shall within six calendar months after the death of such deceased persons as therein mentioned have been brought by or in the name of his or her executor or administrator, then and in every such case such action may be brought by and

The defendants contended that the plaintiff was not entitled to bring this action because she was aware of the fact that her daughter was bringing proceedings under the Workmen's Compensation Act, 1925, and was consenting to such proceedings and was by reason of these facts barred from maintaining this action by s. 29 of the Act of 1925. (1) There

in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every such action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator."

Sect. 2 gives power to the defendant desiring to pay money into Court to pay it in in one sum "without specifying the shares into which it is to be divided by the jury."

(1) The Workmen's Compensation Act, 1925, s. 29: "(1) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

"(2) If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act the action shall be dismissed; but the Court in which the action is tried or if the determination is the determination (on an appeal by either party) by an appellate tribunal, that tribunal shall, if the plaintiff so chooses, proceed to assess such compensation, was no plea that the two sets of proceedings were being brought by the same persons but it was contended that the result of this action if damages were awarded, was necessarily to give compensation to the daughter. The defendants also contended that if the widow was entitled to bring these proceedings, she could only be awarded a proportion of the maximum sum because that sum was to be taken to include compensation for the daughter, who made no claim in these proceedings.

In *Codling* v. *John Mowlem & Co.* (1), where similar proceedings were brought, it was held that the widow's action was not maintainable because her claim had already been admitted and "renounced" by her in the children's proceedings under the Workmen's Compensation Act and that her claim had thus been the subject of adjudication. *Gill* v. *Fortescue & Sons, Ld.* (2) only dealt with the amount to be awarded in a claim under the Workmen's Compensation Act. In *Kinneil Cannel & Coking Coal Co.* v. *Waddell* (3) the two sets of proceedings were not brought by persons who had the option of choosing between the Fatal Accidents Acts and the Workmen's Compensation Act.

The defendants in this case relied partly on the precise words of the Fatal Accidents Act, 1846. *Condliff* v. *Condliff* (4) was distinguishable and the decision was no authority for stating that the widow's damages in such a case as the present must be regarded as recovered partly for the daughter. In the cases referred to it had not been maintained that a widow's action under the Act of 1846 must necessarily include any claim that the dependent children might have. In his view the provisions of s. 29 of the Workmen's Compensation Act, 1925, would prevent such a contention being raised.

The effect of s. 2 of the Act of 1846 was not to compel all

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but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ."

(1) [1914] 3 K. B. 1056; 7 B. W. C. C. 786.
(2) 6 B. W. C. C. 577.
(3) [1931] A. C. 575; 24 B. W. C. C. 181.
(4) (1874) 29 L. T. 831.

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persons who came within the scope of the Act to join in or to be regarded as having joined in the action. The damages to be awarded are for "those for whom and for whose benefit such action is brought," and the Act of 1864 stated that the action might be brought "in the name or names of all or any of the persons" entitled to benefit. The words "shall be brought for the benefit of the wife, etc.," indicate that an action was to be brought for the benefit of all who desired to claim under the Acts but did not compel any person who did not desire to avail himself of the provision to be a party or to share in the damages assessed. Even if this interpretation were wrong, the Act of 1925 gave an option which destroyed the defendants' interpretation of s. 2 of the Act of 1846.

The speeches in *Waddell's* case (1) indicated that a distinct option might be exercised by each dependant provided no individual obtained two payments, one under the Workmen's Compensation Act and one at common law or under any other statute. He therefore held that the widow was entitled to maintain this action for her own benefit. He was satisfied that the widow was entirely dependent on the earnings of her husband and that she had suffered serious pecuniary loss so that the maximum sum of 396*l.* was less than the damage she had suffered. In awarding this sum as damages he took no account of any loss suffered by the daughter.

In the application by the daughter of the deceased man Avery for compensation under the Workmen's Compensation Act, 1925, the county court judge in making his award said that it was contended that inasmuch as her mother had recovered damages under the Fatal Accidents Acts, the applicant was not entitled to succeed, but that in the event of her claim being upheld, the amount of damages recovered by her mother must be taken into account. For the reasons stated in the judgment given in the widow's action those proceedings were not brought for the benefit of the applicant and the damages recovered in those proceedings should not be taken into account. The defence that this claim to compensation was also barred by s. 29 of the Act of 1925 failed.

(1) [1931] A. C. 575; 24 B. W. C. C. 181

The section gave the dependants an option to claim compensation or to take proceedings independently of the Act of 1925 for damages. It was clear from *Waddell's* case (1) that the dependants were not to be regarded as one and indivisible but that each person had an individual option under s. 29. Here the widow had exercised her option in one way and the applicant in the other and neither had interfered in any way in the proceedings brought by the other. He assessed the compensation at 65*l.*

The railway company appealed. The appeal was heard on April 20, 21 and 22 and judgment delivered on May 11.

Hon. S. O. Henn Collins K.C. and *F. W. Beney* for the appellants. The proceedings brought by a widow under the Fatal Accidents Acts, 1846 and 1864, and the Employers' Liability Act, 1880, is by s. 2 of the Act of 1846 for the benefit of the wife, parents (if any) and children. In every case here the group consisted of the wife and a child or children. The group have a single right of action. The action was originally brought by the personal representative but the Act of 1864 enabled a member of the group to claim on behalf of all. When, however, the proceedings are also brought under the Employers' Liability Act, 1880, because apart from that Act the defence of common employment would be available, the damages are by s. 3 limited. Here there was no division of the total damages awarded so as to give the widow only a proper share. Actually in some cases the county court judge has given the widow the maximum sum recoverable under the Act of 1880. If the Court is aware that there are others interested besides the widow it cannot be right to treat this claim as limited to one by the widow. The other members of the group entitled to benefit cannot be excluded. Here, therefore, the children must benefit from the widow's proceedings and it follows that they cannot also recover compensation under the Workmen's Compensation Act, 1925, in view of s. 29, sub-s. 1. It is clear from *Kenneil Cannel & Coking Coal Co.* v. *Waddell* (1) that a person who is not in the two categories of the family group mentioned in s. 2 of the Act of 1846 and the dependants of the deceased workman within the Workmen's Compensation Act, 1925, can claim in respect of the right he has even though others are claiming otherwise. *Gill* v. *Fortescue & Sons, Ld.* (1) is difficult to understand as children of a deceased workman were allowed to recover the whole amount due to the dependants as compensation when there was a widow who was proposing to proceed under the Fatal Accidents Acts. That seems to have involved the widow having renounced her claim as dependant in favour of the children, and if so, and she subsequently obtained damages under the Fatal Accidents Acts, she would have recovered twice over contrary to s. 29 of the Workmen's Compensation Act, 1925: see *Codling* v. *John Mowlem & Co., Ld.* (2), where a widow who had renounced her claim as a dependant in favour of her children was held not to be entitled to damages under the Fatal Accidents Acts. The employers had already paid compensation in full and could be asked to pay no more.

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(1) [1931] A. C. 575; 24 B. W. C. C. 181.

[ROMER L.J. There seems no reason why a particular dependant should not refuse to take her allotted share as a dependant of the deceased workman and then proceed under the Fatal Accidents Acts for damages.]

What is recovered under the Fatal Accidents Acts is for the benefit of the widow and children and the child cannot therefore obtain compensation as well under the Act of 1925. The proceedings for damages might have been brought by the executor of the deceased workman as was necessary under the Fatal Accidents Act, 1846, and what was recovered by him would clearly be for the benefit of both widow and children. The position cannot be altered because under the Act of 1864 the widow could bring the action and did so. It is still a representative action. The whole idea of s. 29 of the Act of 1925 is that the employer should not be twice vexed in respect of the same subject-matter. By her proceedings the widow debarred the children from proceeding under the Workmen's Compensation Act.

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(1) 6 B. W. C. C. 577.

(2) [1914] 2 K. B. 61; 6 B. W. C. C. 767; and on appeal [1914] 3 K. B. 1056; 7 B. W. C. C. 786.

[ROMER L.J. Is not the true view that if the children elect to proceed under the Workmen's Compensation Act, they cannot take the benefits which would otherwise enure to them under the widow's action ?]

The amount recoverable under the Act of 1925 is not dependent on who claims but on what dependants there are. So, too, the damages recoverable under the Employers' Liability Act, 1880, and the Fatal Accidents Acts are for the benefit of the whole class : see *Condliff* v. *Condliff*. (1) It is these facts which debar claims being made for both compensation and damages although they purport to be made by different members of the class. But if this contention were incorrect and the children could decline to take under the claim for damages and the widow under the claim for compensation, that cannot increase the shares of the total damages that the widow can take or the share of the total compensation that the children could take. The county court judge has declined to accept this view and has given damages and compensation as though the persons not claiming could be disregarded. Thus in more than one case he has given the widow the maximum damages payable for the whole group of persons entitled to benefit.

Lynskey K.C. and *W. Shakespeare* for the respondents. Sect. 29 of the Workmen's Compensation Act, 1925, gives the dependants an individual option.

[SLESSER L.J. We need not trouble you to argue that point.]

It is argued that the widow's proceedings under the Employers' Liability Act, 1880, enure in each case for the benefit also of the children of the deceased man. That is not the true view on the construction of the Fatal Accidents Act, 1846 ; s. 2 only restricts the class that could claim damages under the Act. It cannot be that a member of the class would be entitled to benefit, although he had in fact suffered no damages. On the contrary the true view of s. 2 is that it does not compel the executor to sue for the benefit of the

(1) 29 L. T. 831.

whole group of persons mentioned but only for those of the group who have suffered injury by the death; and they are the only persons that can benefit by any proceedings under the Act. That being so, a member of the group who has benefited under the Workmen's Compensation Act must be omitted from the group to benefit under the Fatal Accidents Acts. When once election is made under s. 29 by an individual to proceed for damages or for compensation it debars him from making the alternative claim and the damages or compensation can be awarded in each case to those who are alone entitled to claim.

Again, had the widow been entitled to claim under the Workmen's Compensation Act, 1925, to share in the lump sum to be fixed under s. 8, it may well be that the judge would have increased the allowance for the children under fifteen. As, however, the widow is debarred from claiming under the Act of 1925 by her election to proceed under the Fatal Accidents Acts, she ceases to be a dependant of the deceased workman for the purposes of the Act of 1925. It is true that s. 8 of the Act of 1925 is not framed to suit the right of individual election.

[ROMER L.J. The persons who are dependants of a deceased workman have to be ascertained as at his death and the widow cannot be excluded from the class.]

It is submitted that the county court judge was right to assess the compensation on the footing that the widow was not a dependant, as she was excluded from taking under s. 29.

[They referred to *Taylor* v. *Sir William Arrol & Co.* (1)]

Beney replied and referred to *Moakes* v. *Blackwell Colliery Co.* (2) and *Bennett* v. *Whitehead.* (3)

Cur. adv. vult.

1937. May 11. SLESSER L.J. In these cases, which raise essentially the same problems, I think it convenient first to elucidate the principles involved and thereafter to consider the specific problems raised in each appeal.

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(1) (1937) A. E. R. 658.

(2) [1925] 2 K. B. 64.

(3) [1926] 2 K. B. 380.

In all the cases claims have been made by the widows and children of men who died as a result of a railway collision on January 19, 1936, the men being employees of the London and North Eastern Ry. Co. In each case the widows have brought proceedings under the Employers' Liability Act, 1880, and the children have proceeded under the Workmen's Compensation Act, 1925.

Dealing first with the Employers' Liability Act, 1880, it is necessary in the first place to have regard to the Fatal Accidents Acts, 1846 and 1864. Sect. 1 of the 1846 Act provides: "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." [His Lordship then read ss. 2 and 3 of the Act and s. 1 of the Fatal Accidents Act, 1864, and continued:] In the present case all the widows have brought their actions under s. 1 of the Fatal Accidents Act, 1864. In my view, on the language of that section, they must be taken to have brought them for the benefit of themselves and their children in just the same manner as if the actions had been brought by an executor. Although the children made no claims under the Act, it was incumbent on the county court judge, in the first place, to ascertain the damages attributable to the whole group proportioned to the injury resulting from the death of the workmen to the widows and their children. By reason of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, in so far as the children had claimed compensation under that Act, the employers were not liable to pay them compensation independently of the Act, nor liable to any proceedings independently of the Act, and, therefore, the children were precluded from taking such share as they otherwise might have taken of the damages which would have been divided among them under the Fatal Accidents Act. In other words, the judge should have treated the action, albeit brought in the name of the widow as a claim by her alone, as one for her and the other persons for whose benefit the action must be taken to have been brought, in just the same way as would perhaps more clearly have been the case had the action been brought by an executor for the group of beneficiaries mentioned in the Act.

In the latter case it is apparent that the executor could not of his own choice favour one dependant by excluding the others, though, of course, the others, being declared entitled to their shares, if competent to do so, could disclaim their rights. This method of ascertaining the whole damage suffered and then dividing it up among the dependants in their proper proportions, and allowing to the widows such shares as they would have obtained if the other dependants had claimed, is not a method which has been followed by the county court judge. He has wrongly awarded to the widow the full sum of damages ascertained without considering what the other dependants would have been entitled to had they not brought proceedings under the Workmen's Compensation Act, whereas he should have first ascertained the total damage suffered by all the dependants, including the widow, and so divided that amount that the widow should receive her proportionate share and no more.

In arriving at this conclusion, I do not ignore the difficulties which have arisen through a decision of this Court in *Gill* v. *Fortescue & Sons, Ld.* (1), in which there appear, in the judgment of Lord Cozens-Hardy, what I can only think, although the facts are not entirely similar, to be observations to the contrary effect.

The material facts of *Gill* v. *Fortescue & Sons, Ld.* (1), are these. The children of a workman, killed by accident, applied for compensation as dependants. The widow did not claim, it being understood that she intended to claim under the Fatal Accidents Act. Speaking for myself, I cannot find any suggestion that the widow assigned her waived rights to the children. Under the rules she was made a respondent in the arbitration. A part of the case dealt with a matter not here relevant—as to the total sum which the employers could be called on to pay—but, whatever the sum, the county court judge ordered the whole of it to be paid to the children and on appeal, on this point, it was argued that, the money having been paid into Court on the basis of compensation for all the dependants, if one dependant renounced his share there was a resulting trust to the employers of that share. Lord Cozens-Hardy (1) described the point as so far fetched that it hardly deserved mention. He added: "The widow was not a claimant, and she was not awarded compensation. She might, I assume, if she had been so minded, have made a claim as a dependant, but she did not. And to say that the children, who do claim as dependants, are not entitled to all the sum awarded because one member of the class of dependants decided to stand out and rely on Lord Campbell's Act, seems to be an impossible contention. The dependants who obtained an award as plaintiffs, cannot be prejudiced by the fact that another person who might have become a co-plaintiff has refused to do so."

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(1) 6 B. W. C. C. 577.

These observations in which, apparently, the remainder of the Court concurred were made in relation to the claim of the children to the total sum awardable under the Workmen's Compensation Act, and proceed, I think, on the footing that the widow had not assigned any share to the children, as in *Codling* v. *John Mowlem & Co., Ld.* (2), but had merely stood aside as a claimant. The same principle, if correct, would enable the widow to claim her whole share under the Fatal Accidents Acts, and, therefore, it is convenient to deal with the whole matter at this stage of my judgment.

I find this case difficult, in principle, to distinguish from the present ones, and if it is one which the Court ought now to follow it appears to me to be very much in favour of the respondents in the present appeal, but, in my view, it has been received with such hesitancy in the House of Lords in *Kinneil*

(1) 6 B. W. C. C. 581.

(2) [1914] 2 K. B. 61.

Cannel and Coking Coal Co. v. *Waddell* (1) that I feel justified, in the circumstances, in refusing, respectfully, to follow it. In view of the words which I am about to cite I think that this is one of those cases where, as Lord Alverstone said in *London County Council* v. *Schewzik* (2): "There are strong grounds which enable the Court to say that the previous decisions ought not to be followed."

In *Kinneil Cannel and Coking Coal Co.* v. *Waddell* (1), which I shall hereafter consider on another matter—namely, that of election—it is true that Lord Buckmaster (where he recited that this Court decided that the children were entitled to the whole sum when the mother was taking proceedings under Lord Campbell's Act in *Gill* v. *Fortescue & Sons, Ld.* (3)) said (4): "This case does not come before us for criticism." Also Lord Dunedin (5) added: "I express no opinion as to whether *Gill* v. *Fortescue* (3) was rightly decided or not," but he also spoke of the claim to participate in the lump sum and that no individual was to get two payments, one at common law and one under the Act, observations which I find it difficult to reconcile with the reasoning in *Gill* v. *Fortescue & Sons, Ld.* (3) Lord Warrington (6) commented thus on *Gill* v. *Fortescue & Sons, Ld.* (3): "Whether the actual result was right may be a matter of doubt. As to this, I reserve my opinion." Lord Thankerton (7) also reserved his opinion as to the soundness of the decision. But Lord Russell (8) pointed out that the point was only a subsidiary one and that there was little argument on it. Nowhere in the House of Lords, it is to be noted, although the case was cited in favour of the appellants, was there any expression of approval of *Gill* v. *Fortescue & Sons, Ld.* (3) and some doubt as to its correctness was expressed. In the circumstances, as I have said, I feel myself at liberty to treat the matter as one on which I am free to act on my own judgment.

The next question which falls to be considered is the Employers' Liability Act, 1880. Admittedly, the accident

(1) [1931] A. C. 575.
(2) [1905] 2 K. B. 695, 700.
(3) 6 B. W. C. C. 577.
(4) [1931] A. C. 581.
(5) Ibid. 585.
(6) Ibid. 588.
(7) Ibid. 593.
(8) Ibid. 596.

occurred to the deceased men through the negligence of fellow-workmen, and by s. 1 of the Act of 1880, where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engines, or train upon a railway, the workman, or if the injury results in death, the legal personal representative of the workman and any persons entitled in the case of death, have the same right of compensation and remedies against the employer as if the workman were not a workman of, nor in the service of, the employer, nor engaged in his work. Reliance on that section has the effect of destroying the defence of common employment in the present case, which otherwise might have been fatal to the claimants, but the use of the section brings in s. 3 of the Act, which is to the effect that: "The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person of the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."

Applying that section to the present case the sum recoverable means the total sum payable to the group, and if the widow is only entitled to her proportionate share, irrespective of whether the children do or do not take their shares, so also she is only entitled to a proportionate share of the amount of compensation recoverable under the Act of 1880. The proportion of her share to the total amount awardable under the Fatal Accidents Act being ascertained, there should be an abatement of her claim to such an amount as would give her that share under s. 3 of the Employers' Liability Act which she would have taken had the other dependants made their claims and been compelled to suffer their appropriate abatements.

Next is to be considered the argument that, as the widow elected to proceed under the Fatal Accidents Acts and the Employers' Liability Act, she thereby precluded not only herself but also her children from taking proceedings by

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arbitration under the Workmen's Compensation Act. In that matter the county court judge was right in coming to the conclusion that the election of the mother and of the children were independent elections under s. 29, and that the widow might exercise her option in one way and the children in another.

In my opinion, this point is decided by authority. In the decision in the House of Lords in *Kinneil Cannel and Coking Coal Co.* v. *Waddell* (1) it was held that, where one dependant has exercised an option conferred on him by s. 29, sub-s. 1, of the Workmen's Compensation Act by proceeding against the employer independently of the Act, he cannot be deprived of the benefit of that option by the fact that separate proceedings under the Act could have been taken against the same employer by a second dependant who cannot claim the option. The widow of a miner whose husband had been killed in a pit brought proceedings at common law. A stepson then proceeded under the Workmen's Compensation Act, he being a dependant for the purposes of that Act. Lord Dunedin (2) in a passage to which I have referred in part in another connexion, said: "The argument, accordingly, depends on the view that the term 'workman' is exactly represented by, not the dependants taken individually, but as a body." He continued: "The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum, plus a children's allowance if there are such. But the claim to participate in this lump sum is an individual claim, and what I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act." Lord Warrington (3) said: "The rights of the several dependants are not identical, and it seems to me quite impossible to hold that the independent action of one should deprive the others of the benefit of an option, conferred upon them by the Act, which option they have effectually exercised." Speaking of the definition of a " workman " in s. 48, sub-s. 3, to the effect that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants, the learned Lord said (1): " They also say that under s. 48, sub-s. 3, the dependants must be treated as one and indivisible, and that a claim by one of them followed by payment of compensation, even if only made into Court, for ever debars the prosecution by other dependants of any right of action independently of the Act." Lord Thankerton added (2): " I am therefore of opinion that each person, who is entitled to compensation under the Act on the death of the workman and who has also a right of action independently of the Act, has an individual option under s. 29, sub-s. 1." Lord Russell (3) read into s. 29, sub-s. 1, the words: " Dependants may at their respective options either claim compensation under this Act or take proceedings independently of this Act."

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(1) [1931] A. C. 575.

(2) Ibid. 584.

(3) Ibid. 587.

It is clear from this authority that the claims of the widows under the Employers' Liability Act are not such elections as to debar the children from exercising their option to proceed to arbitrate.

Having said this I pass, therefore, finally to the consideration of the children's claims under the Workmen's Compensation Act. The county court judge proceeds to assess that compensation in accordance with the provisions of s. 8 of the Workmen's Compensation Act, ignoring the widow altogether. In that he fell into an error similar to that which he made in excluding the children from all consideration under the Fatal Accidents Act. Under s. 8 it is necessary for the judge to find a lump sum calculated in accordance with the rules of the statute, where there is a widow and other members of the family wholly or partially dependent, and he has no right to exclude that widow from the ascertainment of the lump sum, if in fact she is dependent on the workman's earnings, merely because she is factually not a claimant. In the language of Lord Dunedin in *Kinneil Cannel and Coking Coal*

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(1) [1931] A. C. 587.
(2) Ibid. 589.
(3) Ibid. 595.

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Co. v. *Waddell* (1): "The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum, plus a children's allowance, if there are such." He went on to point out, in the passage which I have already quoted, that the claim to participate in that lump sum was an individual claim.

Although the lump sum is to be ascertained on the basis that the deceased has left a widow and children, if any, dependent, it may be that the widow is precluded from claiming her share by reason of the fact that she has elected to proceed otherwise than by arbitration, though it is to be observed that she has retained her right under s. 29, sub-s. 2, to make a claim for compensation under the provisions of the Workmen's Compensation Act if the action independently of that Act should be dismissed. As in fact she has succeeded before the county court judge she could not rely on sub-s. 2, and her share of what she would otherwise have received under the lump sum must be excluded, but in arriving at the sums payable to the dependants a proper proportion of the whole of the lump sum must be made in accordance with s. 8 and the rules thereunder, although the widow's share was not claimed and should not be recovered by her.

In the widow's cases, Mrs. Avery, Mrs. Bonner, and Mrs. Watson are all said to be wholly dependent. The maxima under s. 3 of the Act of 1880 are 396*l.*, 389*l.*, and 526*l.* respectively. I am not very clear why the judge in Mrs. Watson's case, on his view, has given only 390*l.*, but in any view the proper procedure for him will be to estimate the whole compensation attributable to the group under the Fatal Accidents Act apart from the limitations in the Act of 1880, ascertain the sum due to the widow and the proportion it bears to the whole, and then make a corresponding proportionate reduction of the maximum as found under the Act of 1880 and allow the widow that sum only. In the case of Mrs. Harris, where a maximum of 438*l.* under the Act of 1880 has been ascertained, the sum attributable to the

(1) [1931] A. C. 584.

widow under the Fatal Accidents Act should further be lessened on account of her partial dependency as found by the judge.

In the case of the claims of the children under the Workmen's Compensation Act the learned county court judge, founding himself, no doubt, on *Gill* v. *Fortescue & Sons, Ld.* (1), has ignored the position of the widows altogether; but for the reasons which I have already given I think that this approach to the problem is untenable. The proper view is, following a method similar to that in the cases under the Fatal Accidents Acts, to ascertain the lump sum distributable as if the widow were a claimant, and then proceeding under the rules laid down in s. 8 of the Act of 1925 to ascertain the sum payable to each dependant, including children's allowances under sub-s. 3. It is only after these sums have been so ascertained, on the basis that the widow takes her share, that the widow's claim is to be eliminated, and then the children should receive no more than they would have got had the widow been a claimant.

It is not necessary here to enter in detail on the awards to the children which have, as I think, been made on a wrong principle. The lump sums which have been found will properly form a basis on which to make the necessary calculations, but at present the fact that the widows would have taken part of them had they not claimed under other Acts finds no recognition. I would add that if the widows are to be disregarded, as the judge appears to think, I do not see how the children's allowance under sub-ss. 3 (i) and (ii), which assumes that there is a widow and children wholly or partially dependent on the workman's earnings, can be supported. Yet the learned county court judge, while excluding the widow from all consideration as a dependant, has, in the cases of Watson, Harris, and Bonner, awarded children's allowances.

All the cases, therefore, for the reasons which I have stated must be remitted to the county court judge for fresh calculation and assessment on the principles which I have endeavoured to indicate, and these appeals be allowed, with costs. The costs in the county court on both hearings to be in the discretion of the county court judge.

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(1) 6 B. W. C. C. 577.

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ROMER L.J. When the death of a workman is caused by the negligence of his employer or a person in the service of his employer the dependants of such workman specified in Lord Campbell's Act are, in certain circumstances, entitled by virtue of the Employers' Liability Act, 1880, to recover from the employer damages proportioned to the injury resulting to them from the death of the workman. It is, however, provided by s. 3 of the last mentioned Act that the amount recoverable under that Act shall not exceed the maximum sum therein specified. In the like circumstances the like dependants would also be entitled to recover compensation under the provisions of the Workmen's Compensation Act, 1925, though that Act also limits the total amount of the compensation to which the dependants between them are entitled. It is accordingly provided by s. 29, sub-s. 1, of that Act as follows: [His Lordship read the sub-section.] By s. 48, sub-s. 3: " Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom or for whose benefit compensation is payable."

In *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell* (1) it was decided by the House of Lords that the option given to the workman's dependants by s. 29, sub-s. 1, is not one which has to be exercised by them as a whole, but that each dependant who may have a claim both under the Workmen's Compensation Act and apart from that Act is entitled to exercise his option independently of the other dependants. " What I think the section means to say," said Lord Dunedin, " and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act." (2)

A dependant cannot, therefore, recover compensation both under the Employers' Liability Act and under the Workmen's

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(1) [1931] A. C. 575.

(2) Ibid. 584.

Compensation Act. The question to be decided on these appeals is whether, where some of the workman's dependants, having rights under both the Employers' Liability Act and the Workmen's Compensation Act, elect to pursue their remedies under one Act, while the rest of those dependants elect to pursue their remedies under the other, any dependant is entitled to recover from the employer under the Act invoked by him a larger sum in compensation than he could have recovered had all the dependants elected to proceed under that Act. Suppose, for example, that a workman is killed by an accident arising out of and in the course of his employment, such accident being due to the negligence of a fellow workman. Suppose further, that his only dependants are his father and his mother. If they both elect to pursue the remedy given them by the Employers' Liability Act they can only recover between them the maximum sum specified in s. 3 of that Act. If they both elect, on the other hand, to proceed under the Workmen's Compensation Act, 1925, they can only recover between them the lump sum calculated in accordance with s. 8 of that Act. But the damages sustained by each of them in fact may be in excess of what he or she will recover by either of these means. In such circumstances is it permissible for the father, say, to proceed under the Employers' Liability Act and to recover the damages which he himself has sustained up to the maximum fixed by that Act, and for the mother to proceed under the Workmen's Compensation Act and to recover the whole of the lump sum calculated in accordance with s. 8 of such Act? In such a case is unity a source of weakness rather than of strength? This is the question involved on these appeals. To answer it the relevant statutory provisions must be carefully examined.

In each of the present cases the death of the workman was caused by the negligence of his fellow servants in charge of an engine. The defence of common employment would, therefore, have defeated any proceedings taken by or for the benefit of his dependants under Lord Campbell's Act, or the Fatal Accidents Act, 1864. It is, however, provided by s. 1 of the Employers' Liability Act, 1880 (among other things), that in such a case any person entitled in case of his death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. The workman's dependants are, therefore, given the same right of compensation and the same remedies against the employer as they would have had against him under Lord Campbell's Act, as amended in 1864, if he had been a stranger. To see, therefore, what that right of compensation is, and what those remedies are, it is necessary to look at Lord Campbell's Act as so amended. But the right and the remedies are given by the Employers' Liability Act alone, and any compensation recoverable from the employer will be compensation "recoverable under this Act" within s. 3 of that Act.

By s. 2 of Lord Campbell's Act it is provided that every action under the Act shall be for the benefit of the wife, husband, parent, and child of the person whose death has been caused, and shall be brought in the name of the executor or administrator of the deceased person. It is further provided by the same section that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and that the amount so recovered after deducting the costs not recovered from the defendant shall be divided among the before mentioned parties in such shares as the jury by their verdict shall find and direct. Sect. 3 provides that not more than one action shall lie for and in respect of the same subject-matter of complaint, and, by s. 4, that in every such action the plaintiff on the record shall be required to deliver to the defendant a full particular of the person or persons for whom and on whose behalf the action is brought. In those two sections the words "for whom" and "on whose behalf" seem to me to have the same meaning. By s. 5, so far as it is material for the present purpose, it is enacted that the word "parent" shall include father and mother, grandfather and grandmother, stepfather and stepmother, and the word "child" shall include son and daughter, grandson and granddaughter, stepson and step-daughter.

By the Fatal Accidents Act, 1864, which amended Lord Campbell's Act, it is provided that in certain circumstances (which are present in these cases) an action under the principal Act may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of the executor or administrator of the deceased.

The result of all this would seem to be as follows. An action under the Employers' Liability Act can be brought by one only of the persons mentioned in s. 2 of Lord Campbell's Act. But such action will necessarily be for the benefit of the others of such persons whether they wish the action to be brought or not. The statute seems to be imperative on this point. Particulars of those other persons must be furnished by the plaintiff, and though no doubt in practice he could safely omit the names of those who had suffered no damage by reason of the death of the workman, the names of those who had suffered any damage would necessarily have to be given. For only the one action can be brought, and the defendant might desire to pay into Court a lump sum to satisfy the claims of all such persons, as he is entitled to do under the provisions of s. 2 of the Act of 1864. Any damages awarded or any lump sum paid into Court by the defendant must be apportioned by the jury or the judge, as the case may be, between all the persons damaged proportionately to the injury sustained by such persons.

Lord Campbell's Act in no way limits the amount of damages which may be awarded, but, as I have already pointed out, the Employers' Liability Act does. In cases, therefore, where the maximum sum permissible under the Act is awarded the sum must be apportioned between the various persons damaged by the death proportionately to the extent to which they have been respectively damaged. But though the action is necessarily brought for the benefit of all the persons mentioned in s. 2 of Lord Campbell's Act who have been damaged by the death, and although the jury or judge, as the case may be, must determine the total amount of the damages sustained by those persons not exceeding the maximum sum recoverable, and apportion such sum among the individuals, there is, of course, nothing in the statute to compel any individual to receive the sum apportioned to him. He may, if he thinks fit, allow such sum to be retained by or go back to the employer. If, however, he does so, the sums payable to the other individuals will in no way be increased. They will get the sums apportioned to them and no more. The employer's liability to each of the dependants under the Act arises on the workman's death, even though the amount cannot be accurately ascertained until later. And though a dependant may subsequently to the death release his right to compensation, he cannot, in my opinion, by any such act, increase the employer's liability to any other dependant.

If I am right so far, the position will be the same whatever the motive of a dependant may be for giving up his claim to compensation under the Act. Whether he gives it up out of mere generosity, or whether he gives it up because he elects to proceed against the employer under the Workmen's Compensation Act, can, in my judgment, make no difference. The sums which would have been payable to the other dependants cannot be increased by reason of his election.

I must now turn to the last mentioned Act. By s. 2 of that Act compensation payable under it is, where the death of the workman results from the injury, payable to or for his dependants. Sect. 4 provides that the dependants entitled to claim compensation under the Act are such of the members of the workman's family as were wholly or in part dependent on the earnings of the workman at the time of his death. Sect. 8 enacts that the compensation under the Act, where death results from the injury and there are dependants, shall be a lump sum calculated in manner therein specified. The precise method of calculating it need not be here stated. It is sufficient to say that its amount in no way depends on the number of the dependants and that it is not to exceed the sum of 300*l*. In certain cases there is payable, in addition to the lump sum, certain allowances for dependent children who are under the age of fifteen years, but the fact does not appear to be material for the moment. It is provided by r. 4 of the Workmen's Compensation Rules, 1926, that an application on behalf of the dependants of a deceased workman for the settlement of the amount payable as compensation to such dependants may be made either by the legal personal representatives of the workman or by the dependants themselves. The rule further provides that, if any dependants neglect or refuse to join in an application, the application may be made by or on behalf of some only of such dependants, but that, in that case, the other dependants are to be named as respondents. By s. 21, sub-s. 2, of the Act, it is enacted that any question who is a dependant shall, in default of agreement, be settled by arbitration or by the county court in accordance with the provisions of the Act, and that the amount payable to each dependant shall be settled in like manner.

It would seem, therefore, that, just as under the Employers' Liability Act, the total compensation payable to the dependants and the proportion payable to each dependant individually will be settled in one and the same proceeding. A dependant may, of course, waive his right to take the sum allotted to him, but should he do so his waiver will not operate so as to increase the sum payable to the other dependants, except in so far as his waiver can be regarded as equivalent to an assignment of his right in favour of those other dependants. An example of a waiver of this kind is to be found in *Codling* v. *John Mowlem & Co., Ld.* (1) The widow in that case waived her right in favour of her children, and on that ground was held by the Court of Appeal to have elected to proceed under the Workmen's Compensation Act and to have lost her right to proceed under Lord Campbell's Act.

Where a dependant dies before a claim under the Act is made or, if a claim has been made, before an agreement or award has been arrived at or made, the legal personal representatives of the dependant have no right to payment of compensation, and the amount of the compensation is to be

(1) [1914] 2 K. B. 61.

calculated and apportioned as if that dependant had died before the workman (see s. 2, sub-s. 3, of the Workmen's Compensation Act, 1925). But, subject to this, the rights of the dependants and the liability of the employer come into existence at the date of the workman's death, though the pecuniary measurement of them has to be made afterwards.

On the death of a workman, therefore, a dependant of his may acquire two rights—one under the Employers' Liability Act and the other under the Workmen's Compensation Act. Which of these two rights he will enforce is left to his choice. But having chosen one he is debarred from enforcing the other, and the compensation which he is debarred from recovering will cease to be payable by the employer. It does not, in my judgment, accrue to the other dependants. In the cases with which this appeal is concerned the employer's liability to the widow and to the children under each Act should be ascertained. The widows, having elected to proceed under the Employers' Liability Act, should recover the amounts allotted to them under that Act and no more. The children, having elected to proceed under the Workmen's Compensation Act, should recover or have provided for them, as the case may be, the amount allotted to them respectively under that Act and no more.

The eight appeals should, therefore, in my opinion, be allowed, and the cases remitted to the county court judge to make awards on the footing which I have indicated.

I have not so far referred to *Gill* v. *Fortescue & Sons, Ld.* (1), on which the respondents to this appeal very naturally relied. In that case, however, no proceedings under Lord Campbell's Act had been taken by the widow. It was merely "understood" that she intended to do so in the future. But she had been made a respondent to the application by the children under the Workmen's Compensation Act, and according to the report had "renounced her interest under the arbitration." Whether or not she had renounced it in favour of her children (as in *Codling* v. *John Mowlem & Co.* (2)) does not appear. But in any case the Court was not called on to consider what

(1) 6 B. W. C. C. 577.

(2) [1914] 2 K. B. 61.

would be the effect on the widow's rights under Lord Campbell's Act of the receipt by the children of the whole compensation payable under the Workmen's Compensation Act. The case, moreover, received some adverse criticism in the House of Lords in *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell* (1) to which I have already referred. Lord Dunedin in terms refrained from expressing any opinion whether it had been rightly decided. Lord Warrington said that it might be doubtful whether the actual result of the case was right, as to which he reserved his opinion. Lord Thankerton said that he desired to reserve his opinion as to the soundness of the decision. But the case has not been overruled and, in a case where the facts were the same I should, for myself, feel bound to follow it. As, however, the present case differs in the material respect that the widows have in fact proceeded under the Employers' Liability Act, and are entitled to have damages awarded to them under that Act, we are not precluded from expressing our own view as to the true effect of s. 29 of the Workmen's Compensation Act, 1925.

LUXMOORE J. These eight appeals relate to claims for compensation made by the dependants of four workmen employed by the London and North Eastern Ry. Co. who who were fatally injured in a collision between a ballast train, in which they were travelling, and two coupled light engines. It is admitted that the collision was caused by the negligence of fellow servants of the deceased workmen and that consequently rights to compensation for their respective dependants arise under the Employers' Liability Act, 1880, and also under the Workmen's Compensation Act, 1925.

Each of the deceased workmen left a widow and a child or children dependent on him but no other dependants. The widow in each case has elected to seek her remedy under the Employers' Liability Act, 1880, while the child or children has or have elected to claim under the Workmen's Compensation Act, 1925. The county court judge, in awarding compensation, has proceeded on the footing that the widow is, in the

(1) [1931] A. C. 575.

circumstances, the only person to be considered in the proceedings instituted by her under the Employers' Liability Act, while the child or children is or are the only person or persons to be considered in the proceedings instituted on his, her, or their behalf under the Workmen's Compensation Act, and he has fixed the amount of compensation to be awarded in each of the cases under appeal in accordance with that view.

The question to be considered in each appeal may be shortly stated in these terms: "In cases where some or one of the dependants of a workman killed in an accident caused by the negligence of a fellow workman elect to proceed under the Employers' Liability Act and the other or others of them elect to proceed under the Workmen's Compensation Act, can any of those dependants under either Act recover a larger sum under the Act chosen than they, he or she would have been able to recover if all the dependants had proceeded under the same Act?"

The county court judge has in substance answered this question in the affirmative. The railway company contend that the answer should be in the negative.

To determine which is the correct contention it is necessary to consider the relevant provisions of the two Acts, and in doing so to bear in mind that before the Employers' Liability Act was passed in 1880 it was impossible for the dependants of a workman killed or fatally injured in an accident caused by the negligence of a fellow workman to recover compensation for the injury suffered by them, because the defence of common employment afforded a complete answer to any claim under the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), and the Fatal Accidents Act, 1864, which amended Lord Campbell's Act. One of the objects of the Employers' Liability Act, 1880, was to remove this disability. By s. 1 of that Act it is provided that any person entitled, in case of the death of a workman caused by the negligence of a fellow workman, shall have the "same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." The right and remedies so conferred are those which the dependants would have had under Lord Campbell's Act and the amending Act if the deceased workman, on whom they were dependent, had been a stranger to the employer. By s. 3 of the Employers' Liability Act, 1880, a limit is placed on "the amount of compensation recoverable under this Act," that is, the Employers' Liability Act, 1880. The limit is fixed at "such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

It is to be observed that, although it is necessary to refer to Lord Campbell's Act as amended to ascertain what are the rights and remedies given by the Employers' Liability Act, those rights and remedies are conferred by the Employers' Liability Act, and that any compensation recovered from the employer by the exercise of those rights and remedies is properly recovered under the Employers' Liability Act and not under Lord Campbell's Act or the amending Act.

The full title of Lord Campbell's Act is "An Act for compensating the families of persons killed by accidents." Its object was to render liable in damages a person who, by his wrongful act, neglect or default, had caused the death of another. By s. 2 it is enacted that any action brought against the person liable "shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased." It is further provided by the same section that: "In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whom and for whose benefit such action shall be brought," and that the amount recovered after deducting certain costs shall be divided among the before mentioned parties in such shares as the jury, by their verdict, shall direct. Sect. 3 provides that not more than one action shall lie for and in respect of the same subject-matter of complaint.

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By s. 4 the plaintiff, in an action under the Act, is required to deliver "a full particular of the person or persons for whom and on whose behalf such action shall be brought and of the nature of the claim in respect of which damages" are sought. By s. 5 "parent" is defined as including father, mother, grandfather, grandmother, stepfather, and stepmother, and "child" is defined as including son, daughter, grandson, grand-daughter, stepson, and stepdaughter.

Difficulty arose because it frequently happened that no legal personal representative of the deceased had been constituted. To meet that difficulty the Fatal Accidents Act, 1864, was passed. It provides by s. 1 that, if there is no legal personal representative of the deceased, or there being such, no such action as is mentioned in Lord Campbell's Act shall have been brought by or in the name of his legal personal representative within six months after the death, "then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of" the legal personal representative. Every action brought under this section is to be "for the benefit of the same person or persons and shall be subject to the same regulations and procedure as nearly as may be as if it were brought by and in the name of" the legal personal representative. Sect. 2 provides that "it shall be sufficient, if the defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under the said Act . . . . without specifying the shares into which it is to be divided by the jury."

The position under Lord Campbell's Act as amended is that the action must be brought either by the legal personal representative of the deceased or by one of the class of persons named in s. 2 of Lord Campbell's Act. It is not a representative action in the strict sense of the term. Only one action can be brought and whatever amount is recovered is to be for the benefit of all the members of the class of persons named in the Act. The amount recovered is to be divided by the jury between the members of the class having regard

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to the injury suffered by each. In view of the provisions that only one action can be brought and that the action is to be for the benefit of the whole class, I do not think that the words in s. 2 of Lord Campbell's Act " for whom and for whose benefit such action shall be brought " can properly be construed as referring only to those members of the class who may be mentioned in the particulars required to be delivered by the plaintiff in such an action. It is obviously the duty of the plaintiff to give particulars of all the members of the class—but failure to give particulars of all such persons does not enable a second action to be brought by those whose names are omitted, nor can non-compliance with the requirement limit the effect of the mandatory words " every such action shall be for the benefit of " the whole class to such of its members as may be named in the particulars. In my judgment the words " for whom and for whose benefit the action shall be brought " must be construed as referring to the whole class of persons named in the second section of the Act.

I am unable to find anything in the amending Act to alter or displace the construction of the earlier Act. Indeed, the provisions in s. 2 of the Act of 1864 appear to me to afford strong confirmation that the construction which I have placed on it is correct. " All persons entitled under the said Act " must, I think, refer to the whole class of persons mentioned in the opening sentence in s. 2 of the earlier Act.

It is to be observed that there is no limit fixed with regard to the amount of compensation recoverable under Lord Campbell's Act as amended, and that by s. 3 of the Employers' Liability Act a limit is placed on the amount of compensation recoverable. It seems clear that whatever the total amount recovered under the Employers' Liability Act may be, whether it is equal to or is less than the maximum, it is the duty of the Court or the jury (as the case may be) to apportion that total amount between the class of persons damaged by the death in proportion to the injury each of the individual members of the class has suffered. But when this has been done there is nothing in the statute which makes it obligatory on any individual to receive the share apportioned to him or her—nor is there any provision which gives a share which an individual is, for any reason, unwilling to receive to the other members of the class or any of them. In my judgment, the liability of the employer to the dependants is fixed by the Act and arises immediately on the death of the workman, although it must necessarily be ascertained at a later date. It seems to me plain that the liability of the employer to any particular dependant cannot be increased or diminished by reason of the exercise by a dependant of his or her volition and that it makes no difference what the motive of a dependant may be in refusing to accept his or her share or in electing to pursue his or her rights under the Workmen's Compensation Act. If, however, an individual dependant assigns his or her share for the benefit of the other dependants, the position is different, for he or she must, by reason of the assignment, be held to have accepted the share, for it is only on this basis that an assignment can be made.

So much for the Employers' Liability Act. Let me now consider the relevant provisions of the Workmen's Compensation Act, 1925. Sect. 2 of that Act provides that, where the death of a workman results from an injury by accident arising out of and in the course of the employment, compensation shall be payable to or for the benefit of his dependants as provided by the Act. Sect. 4 defines the persons included under the term dependants as being such members of the workman's family as were wholly or in part dependent on the earnings of the workman at the time of his death—and there is an express provision which enlarges the class of dependants beyond the definition in Lord Campbell's Act. Sect. 8 lays down the method of fixing the amount of compensation payable in case of fatal accident where there are dependants. It is unnecessary to state the precise details. It is sufficient to say that it is to be a lump sum which must not exceed 300*l.* Its amount does not depend on the number of dependants. If there are children, then in certain cases, in addition to the lump sum, what is referred to as " children's allowance " is also payable in respect of children under the age of fifteen.

Sect. 21, sub-s. 2, of the Act provides that any question as to who is a dependant shall, in default of agreement, be settled by arbitration or by the county court, and that the amount payable to each dependant shall be settled in the same way. Sect. 29, sub-s. 1, provides: [His Lordship read the sub-section :] By s. 48, sub-s. 3, it is provided that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representatives or other person to whom or for whose benefit compensation is payable.

Rule 4 of the Workmen's Compensation Rules, 1926, provides that an application on behalf of a workman's dependants for the settlement of the amount of the compensation payable to such dependants " may be made by the legal personal representative, if any, of the deceased workman on behalf of such dependants or by the dependants themselves," and in either case particulars are to be filed as to the dependant on whose behalf the application is made, and that if there is any conflict of interest between the dependants themselves, or if any dependants neglect or refuse to join in an application, the application may be made by or on behalf of some only of such dependants, the other dependants in either case being named as respondents.

These provisions appear to me to lead to a conclusion similar to that at which I have arrived with regard to the Employers' Liability Act—namely, that the total compensation payable to the dependants and the proportion payable to each individual dependant must be ascertained under the Workmen's Compensation Act in one proceeding. A dependant may refuse to accept the proportion of the compensation awarded to him or her under the Workmen's Compensation Act in precisely the same way as he or she may do so under the Employers' Liability Act, but such refusal cannot increase the proportions to be awarded to other dependants under the Workmen's Compensation Act. Again, the position seems to me to be the same if, instead of refusing to receive his or her share under the Workmen's Compensation Act, a dependant assigns that share to the remaining dependants. In such a case the dependant making the assignment must, of necessity, accept the share and by so doing elect to accept his or her compensation under the last named Act. I think that this conclusion is the basis of the decision in *Codling* v. *John Mowlem & Co., Ld.* (1)

That the option given by the Workmen's Compensation Act is exercisable by the individual members of the class of dependants entitled to be compensated under either Act has been finally decided by the House of Lords in *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell.* (2) As Lord Dunedin pointed out in his speech (3), no real difficulty is caused by such a conclusion. The compensation to be paid by the employer under the Employers' Liability Act is a lump sum. Under the Workmen's Compensation Act it is an aggregate of what is called in that Act a lump sum plus a children's allowance, if there are children. The claim to participate in this lump or aggregate sum is an individual claim. Sect. 29 of the Workmen's Compensation Act provides that no individual is to get payment both under the Employers' Liability Act and under the Workmen's Compensation Act. It would seem to be the logical conclusion of this decision that if some of the dependants institute proceedings under the Employers' Liability Act, it is the duty of the tribunal invoked to assess the damage to the whole class of dependants in one lump sum and to apportion it between all the members of that class. In the same way, if others of the dependants institute proceedings under the Workmen's Compensation Act, it is equally the duty of the tribunal invoked to ascertain the aggregate sum available for all the dependants and apportion it between them. No person in whose favour an apportionment is made under both Acts can claim both apportionments. If he or she has elected to proceed under one of the Acts, he or she can only recover what is apportioned to him or her under that Act. The introduction by the Workmen's Compensation Act of an alternative remedy to that afforded by the Employers' Liability

(1) [1914] 2 K. B. 61.
(2) [1931] A. C. 575.
(3) Ibid. 584.

Act cannot affect the construction of either Act so as to increase the amount available for distribution among those electing to take compensation under one or other of the two Acts.

Our attention was called to the decision of the Court of Appeal in *Gill* v. *Fortescue & Sons, Ld.* (1), and reliance was placed on it by the respondents. For the reasons given by Romer L.J. in his judgment, which I have had the opportunity of reading, I respectfully agree that this decision does not preclude us from expressing our own view of the construction and effect of the Acts under consideration.

It follows from what I have said that the liability of the railway company to the widow and dependants of each of the deceased workmen should be ascertained under the Employers' Liability Act, and also under the Workmen's Compensation Act. Each widow having elected to pursue her remedy under the Employers' Liability Act will be entitled to the amount allotted to her under that Act in respect of the injury which she has suffered, and each of the other dependants having elected to claim under the Workmen's Compensation Act will be entitled to the respective amounts allotted to them under that Act in respect of the injury suffered by him or her.

In the result, I also am of opinion that all the appeals should be allowed and that each of the cases under appeal should be remitted to the county court so that awards may be made on the basis laid down in the judgments of this Court. I also agree with the order which has been stated by Slesser L.J. with regard to the incidence of costs.

Appeals allowed.
Leave to appeal granted.

Solicitors: *Pattinson & Brewer; I. B. Pritchard.*

H. C. G.

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(1) 6 B. W. C. C. 577.

ELMHIRST *v.* COMMISSIONERS OF INLAND REVENUE.

1937
March 15,
16, 17.

Revenue—Income tax—Inclusion of wife's income—Computation of wife's income—Inclusion of her pre-nuptial income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 16.

The appellant was assessed to income tax, and under the provisions of r. 16 of the All Schedules Rules to the Income Tax Act, 1918, his wife's income was deemed to be his, and was included in his assessment. In computing the wife's income her income in the year preceding the year of assessment acquired before she married the appellant was included:—

Held, that there was nothing in r. 16 to make the computation of the income of a married woman different from that of a feme sole. The operation of the proviso to r. 16, whereby that income was deemed to be that of her husband, was for the purposes only of assessment and charge to income tax.

Inland Revenue v. *Brooke* [1923] 2 K. B. 814; 8 Tax Cas. 527, considered.

CASE stated by Commissioners for the Special Purposes of the Income Tax Acts under s. 149 of the Income Tax Act, 1918.

At a meeting of the commissioners on February 12, 1936, the appellant, L. K. Elmhirst, a British subject, appealed against three assessments to income tax in the sums of 500*l.*, 150,000*l.* and 100,000*l.* for the years ending April 5, 1926, 1927 and 1928. The assessments were made under Cases IV. and V., Sch. D, to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), in respect of income arising to Mrs. Elmhirst, the appellant's wife, from securities, stocks, shares and rents in a place out of England.

Mrs. Elmhirst was formerly Miss Payne Whitney, an American citizen, domiciled and resident in the United States, and on April 3, 1925, she married the appellant. Lawrence J. found that there was evidence (set out shortly in the judgment) upon which the commissioners could find, as they did, that Mrs. Elmhirst was ordinarily resident in the United Kingdom from 1925 to 1928.

It was contended for the Crown that Mrs. Elmhirst's pre-nuptial income, before she became chargeable to income tax

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in the United Kingdom, could, for the purposes of average, be regarded in the computation of the appellant's income in 1925 to 1928, the said years of assessment, and he was assessed accordingly.

The commissioners upheld the assessment.

J. Millard Tucker K.C. and *J. S. Scrimgeour* for the appellant. This case is covered by *Inland Revenue* v. *Brooke.* (1) The principle to be gathered from that case is that proviso (I.) to r. 16 of the All Schedules Rules to the Income Tax Act, 1918 (2), will not operate in the year of assessment if the facts as to the marriage in that year are not the same as in the year of measure; and they were not the same in the present case. In the year of assessment the appellant was a man living with his wife, but in the year of measure he was not. Rule 16, proviso (I.), will never apply unless the facts in the year of assessment and those in the year of measure are within it. If a man marries in the year of assessment the proviso cannot be treated as applying both to the year of assessment and to the year of measure. In *Walker* v. *Howard* (3) a married man received income from War Loan for the first time in the year of assessment; his wife had also received income from War Loan in the year preceding the year of assessment. Rowlatt J. held that the husband's income did not "first arise" in the year of assessment within the meaning of s. 17

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(1) [1923] 2 K. B. 814; 8 Tax Cas. 527.

(2) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), All Schedules Rules, r. 16: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that (I.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee. . . ."

Rule 18: "Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within three years after the expiration thereof, upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

(3) (1927) 13 Tax Cas. 313.

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of the Finance Act, 1922 (12 & 13 Geo. 5, c. 17)—that is, that for the purpose of computation the wife's income in the year of measure was that of the husband. But that case was disapproved by the Court of Appeal in *Leitch* v. *Emmott.* (1) The proviso to r. 16 does not relate solely to the collection of the tax, but also to its computation. "The profits of a married woman living with her husband shall be deemed the profits of her husband" in r. 16 "refers to the profits of a married woman while she is a married woman and not to the profits which she had before her marriage"—per Rowlatt J. in *Inland Revenue* v. *Brooke.* (2) Therefore in computing the wife's income in this case her pre-nuptial income cannot be included and then deemed to be that of the husband.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The fundamental fallacy running through the argument for the appellant lies in the failure to distinguish between the method of computing the profits and of assessing the profits to be taxed. Rule 16 is dealing with the profits to be taxed, namely, those of a married woman living with her husband as being deemed to be his. There is nothing in the rule or elsewhere to show that the wife's profits—for which the operative words of the rule says she is to be charged as if she were sole—are to be computed differently because at the time of computation in the year of charge she is a married woman. It merely says that they are to be deemed to be those of the husband. But that is only for the purpose of collection and assessment. It is accordingly necessary to ascertain what those profits were in the year preceding the year of charge. *Inland Revenue* v. *Brooke* (2) is distinguishable because that was a case dealing with super-tax, and was decided on the words of s. 5 of the Income Tax Act, 1918, which do not apply to the present case. The pre-nuptial profits of the wife are to be computed as if she was still unmarried, and are then, by the operation of the proviso to r. 16, to be deemed those of the husband.

(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.
(2) [1923] 2 K. B. 814, 827; 8 Tax Cas. 527, 537.

[*Fry* v. *Burma Corporation* (1); *Singer* v. *Williams* (2); *Back* v. *Whitlock* (3); and *Brown* v. *National Provident Institution* (4) were also referred to.]

LAWRENCE J. In this case I think, in view of the long list I have to deal with, I had better deliver my judgment now; although the case is one of importance and of some difficulty.

There are two questions involved. The first is whether Mrs. Elmhirst, the wife of the appellant, was ordinarily resident in the United Kingdom during the years for which the appellant has been assessed to income tax—namely, the years ending April 5, 1926, April 5, 1927, and April 5, 1928. The question is whether there was any evidence upon which the special commissioners could come to the conclusion that Mrs. Elmhirst was ordinarily resident in the United Kingdom during those years, or any of them.

It is agreed in the argument for the appellant that the later years are more difficult than the first year; and the principal argument is that in the year 1925–26 there was no evidence upon which the commissioners could reasonably come to the conclusion that Mrs. Elmhirst was ordinarily resident in the United Kingdom.

The facts are stated in detail in the case and I need not go into them fully. Apparently Mr. Elmhirst and Mrs. Elmhirst, having met in the United States of America before 1925, had both become interested in the subject of education, and particularly of co-education. Before the year 1925–26 Mrs. Elmhirst had formed the intention of founding a school for co-educational purposes in the United Kingdom, and in March, 1925, had asked Mr. Elmhirst to find a site suitable for such school. He had actually found a site at Dartington Hall, near Totnes, in Devonshire, and had communicated that fact to her, and went subsequently to America in March, 1925. Then in April, 1925, the appellant and Mrs. Elmhirst were married. They came over to England in May, 1925, and after inspecting the site which the appellant had provisionally chosen, on September 8, 1925, Mrs. Elmhirst entered into a contract for the purchase of Dartington Hall for this co-educational school. The case states that Mrs. Elmhirst intended to see that the school was running smoothly before she returned to the United States, and that originally she had no intention of making a permanent residence for herself and the appellant in the United Kingdom. But subsequently she determined to take a cottage, and did take a cottage in 1928, and a flat in London in 1933; and ever since she has resided in the United Kingdom, except for visits to the United States of America, where she has continued to maintain two residences fully staffed.

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(1) [1930] A. C. 321; 15 Tax Cas. 113.
(2) [1921] 1 A. C. 41; 7 Tax Cas. 419.
(3) [1932] 1 K. B. 747; 16 Tax Cas. 723.
(4) [1921] 2 A. C. 222; 8 Tax Cas. 57.

The appellant's argument, as I understand it, is that at any rate during 1925–26, although the appellant resided in England for eight months of that year, and Mrs. Elmhirst resided for seven-and-a-half months of that year in the United Kingdom, at that time they had no intention of staying permanently in the United Kingdom; that the object of their visit was of a nature which was extraordinary in the course of Mrs. Elmhirst's life; and that for that year, at any rate, it was impossible for a reasonable tribunal of fact to come to the conclusion that she was ordinarily resident in the United Kingdom. I find myself unable to accept this contention, or to say that the commissioners were not entitled to find that Mrs. Elmhirst's residence for seven-and-a-half months during that year rendered her ordinarily resident in the United Kingdom for that year, and, as is agreed by counsel for the appellant, a fortiori in the years which followed. I think there is ample evidence upon which the commissioners might come to that conclusion though it is possible that other tribunals of fact might have come to a contrary conclusion.

The second point which arises in the case is whether the income which Mrs. Elmhirst enjoyed during the three years before the years of assessment can be regarded for the purposes of computation of the appellant's income tax in the years 1925 to 1928. This question involves the construction of

General Rule 16 of Sch. A, B, C, D and E of the Income Tax Act, 1918, which is in these words, so far as material: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were still sole and unmarried: Provided that (1.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee." It is argued for the appellant that the case is really covered by the decision of Rowlatt J. in *Inland Revenue* v. *Brooke.* (1) On the other hand it is argued for the Crown that the case is covered by *Leitch* v. *Emmott* (2); *Singer* v. *Williams* (3); *Fry* v. *Burma Corporation* (4); and *Back* v. *Whitlock.* (5)

In the last group of cases it was decided that profits or income, although they are not chargeable to income tax, and although the recipient of those profits or income himself is not chargeable to income tax, may be brought in as a basis of computation when the alleged tax-payer becomes chargeable to income tax. That is to say, that a tax-payer may be assessable and chargeable to income tax by reference to profits or income which he received, or which accrued to him before he became chargeable to income tax.

The case of *Leitch* v. *Emmott* (2) was a case in which a lady who had been living with her husband became a widow in the year of assessment, and it was held that she might be assessed for that year of assessment on the basis of the income which she had enjoyed during the previous year, although she was then a married woman living with her husband, and by virtue of r. 16 her profits were deemed to be the profits of her husband. The real ground of that decision is in my opinion stated in the judgment of Lawrence L.J., where he says (6): "Rule 16 provides, in the first instance, that a married woman entitled

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(1) [1923] 2 K. B. 814; 8 Tax Cas. 527.
(2) [1929] 2 K. B. 236; 14 Tax Cas. 633.
(3) [1921] 1 A. C. 41; 7 Tax Cas. 419.
(4) [1930] A. C. 321; 15 Tax Cas. 113.
(5) [1932] 1 K. B. 747; 16 Tax Cas. 723.
(6) [1929] 2 K. B. 246; 14 Tax Cas. 642.

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Lawrence J.

to any property to her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Then, turning back to r. 2 of the rules applicable to Case III., we find that the measure of that charge to tax is the amount of the income from her investments arising in the year preceding the year of assessment, It is clear to my mind, therefore, that the married woman is charged to tax in respect of her income for the year of assessment, to be measured by the income from the same investments received by her in the preceding year, thus showing that the income for the purpose of the charge and of the measure of the tax is treated as her income. The proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the object of facilitating the collection of the tax, that the assessment and charge shall be made in the name of the husband, and that for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my judgment, operate to convert the income of the wife into income of the husband further than is necessary for the purpose of collecting the tax; with the result that it affords no valid ground for the contention that there was no income arising from the wife's investments in the year preceding the year of assessment within the meaning of r. 2 of Case III."

In my opinion that case was based upon an interpretation of r. 16, sub-cl. 1, with which I respectfully agree, that it relates to the profits of the married woman for the year of assessment; and provides that, if the married woman is living with her husband, her profits for the year of assessment shall be assessed and charged in his name, and does not affect the years of computation in any shape or form. If that is so, and it is the view of the Court of Appeal by which I am bound, and with which I agree, then r. 16 and the proviso have no effect upon the fact in this case that Mrs. Elmhirst was not a married woman living with her husband during the period of computation. She was a married woman living with her husband in the year of assessment; and, therefore, her profits for that year are to be assessed and charged in his name:

but as the Court of Appeal say in *Leitch* v. *Emmott* (1) that is only for the purposes of facilitating the collection of tax. If, therefore, it is remembered that there is nothing inconsistent with the scheme of the Income Tax Acts that a person should be taxed when ordinarily resident in the United Kingdom upon the basis of income received when not assessable or chargeable to tax, because not resident in the United Kingdom, then it appears to me that there is nothing in the contention of the appellant that he ought not to be, or cannot be, assessed and charged to tax upon an income which Mrs. Elmhirst enjoyed when not chargeable to tax in the three years preceding the year of assessment in each case.

The difficulty of the case arises principally from the decision of Rowlatt J. in *Inland Revenue* v. *Brooke* (2), which was a case of super tax, in which he held that a husband could not be assessed to super tax in respect of his wife's pre-nuptial income, but that his wife was chargeable in respect of her income of the preceding year up to the date of her marriage, notwithstanding that she was a married woman at the time of making the assessment. It has been contended for the Crown that this case is distinguishable because it was decided upon the super tax provisions of the Income Tax Act, 1918. I think that is a possible ground of distinction; because undoubtedly Rowlatt J. does base his judgment upon the very words of s. 5 of the Act of 1918, which are inapplicable to the present case, which deals solely with income tax. But Rowlatt J. does treat the proviso to r. 16 as though it had reference to the period of computation, and related to the profits arising to a married woman during that period. One ground of his decision was that the husband could not be assessed to super tax in respect to his wife's pre-nuptial income, because within the meaning of r. 16 she was not pre-nuptially a married woman living with her husband. So far as that ground of the decision is concerned, in my opinion it is overruled by *Leitch* v. *Emmott* (1) although there is no reference in the judgment in the Court of Appeal in that case to Rowlatt J.'s

(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.
(2) [1923] 2 K. B. 814; 8 Tax Cas. 527.

decision, which, however, was cited. In my judgment the decision of the Court of Appeal upon the meaning of the proviso to r. 16 is inconsistent with the dictum in, or the basis of, Rowlatt J.'s judgment in the case that I have cited; and I, therefore, think it my duty to follow the case of *Leitch* v. *Emmott.* (1) I am also of opinion, on the construction of r. 16, that the decision of the Court of Appeal was right.

For these reasons, I think that this appeal must be dismissed with costs.

Solicitors for appellant: *McKenna & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.

W. L. L. B.

1937
March 22.

DUCKWORTH *v.* LOWE (H.M. INSPECTOR OF TAXES).

Revenue—Income Tax—Profits of married woman living with her husband—Wife resident in the United Kingdom—Husband resident abroad for business purposes—Husband visiting this country during each year of assessment—Liability of non-resident husband to assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 102, *sub-s.* 3; *Sch. D, Miscellaneous Rules, r.* 4, *sub-r.* 5.

By s. 102, sub-s. 1, of the Income Tax Act, 1918, it is provided that: " If any person shall come into a parish in which he has not been charged to tax, the assessor, collector, or surveyor may give him notice in writing to deliver, within fourteen days from the giving of the notice—(*a*) a declaration . . . . specifying the parish and county in which he has been assessed; or (*b*) in default thereof, a statement in order that he may be assessed and charged in the parish into which he has come."

Sub-s. 3: " If in any case a person who is, or who resides, in any parish has not been assessed therein, the commissioners acting for the parish may assess him, as though he had been resident there at the time of the publication of the general notices directed by this Act, unless he proves to their satisfaction that he has been duly assessed in some other parish."

Rule 4 of the Miscellaneous Rules applicable to Sch. D sets forth the place of assessment in different cases, and sub-r. 5 is as follows: " Every other person not hereinbefore described shall be assessable and chargeable in the parish where he resides at the time of the issue of the general notices under this Act, or where he first comes to reside after the time of the issue of those general notices."

The appellant, a partner in a firm of cotton brokers in Egypt, appealed against assessments made upon him by the Additional Commissioners of Income Tax in Liverpool in respect of War Loan, bank, and other interest received by his wife. The wife, who was ordinarily resident in the United Kingdom, had been held (see *Browning* v. *Duckworth* [1935] 1 K. B. 605; 19 Tax Cas. 149) to be a married woman living with her husband, within the meaning of r. 16 of the General Rules of the Act of 1918, during the whole period of assessment. The husband was not resident in this country, he carried on no trade, profession, employment or vocation here, but he had paid short visits to the United Kingdom during each of the years for which assessments were made, and was at some time during each of those years at the offices of certain chartered accountants at 309, India Buildings, Water Street, Liverpool. The assessments appealed against were made upon him as at that address. For the appellant it was contended that Miscellaneous r. 4 applied only to persons resident in the United Kingdom, and was exhaustive as to the place of assessment, and that the Income Tax Acts failed to provide any machinery for assessment in the particular circumstances of the case:—

Held, that s. 102, sub-s. 3, drew a clear distinction between a person who was "in" the parish and a person who "resided" in the parish; that when that sub-section was read in conjunction with r. 4, sub-r. 5, of the Miscellaneous Rules it was clear that persons who were not resident in the United Kingdom were liable to assessment whenever they came into the country, and the appeal must be dismissed, with costs.

APPEAL by way of case stated by the Commissioners for the special purposes of the Income Tax Acts, confirming assessments to income tax made upon the appellant, G. S. Duckworth, by the Additional Commissioners of Income Tax in Liverpool, in respect of War Loan interest, bank interest, and National Savings Bond interest, receivable by his wife, as under:—

1929–30, for War Loan interest 1752*l*. 10*s*.; for bank interest 23*l*. 10*s*.

1930–31, for War Loan interest 1752*l*. 10*s*.; for bank interest 22*l*. 15*s*.

1932–33, for War Loan interest 1542*l*. 10*s*.; for bank interest 27*l*. 16*s*.

1933–34, for War Loan interest 904*l*. 15*s*.; for National Savings Bond interest 13*l*. 18*s*.

The appellant, a partner in a firm of cotton brokers at Alexandria, Egypt, was not resident in the United Kingdom during any of the years for which the assessments were made. He carried on no trade, profession, employment or vocation, and was not a householder, in the United Kingdom during any of such years. The appellant's wife was, however, ordinarily resident in this country, and the assessments were in the first instance made upon her, but on appeal they were discharged on the ground that she was during the period of the assessments a married woman living with her husband, within the meaning of r. 16 of the General Rules, Income Tax Act, 1918: see *Browning* v. *Duckworth*. (1)

During each of the years for which the assessments were made the appellant visited this country for a short period, and was at some time during each of those years (either with or without his wife) at the offices of Blease & Sons, chartered accountants, 309, India Buildings, Water Street, Liverpool. The assessments appealed against were made as at that address.

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(1) [1935] 1 K. B. 605; 19 Tax Cas. 149.

The Commissioners gave the following reasons for confirming the assessments :—

" It was not clear to us at first sight how much guidance we could really get in this case from *Tischler* v. *Apthorpe.* (1) In that case there was a trade here, and the senior partner came here and could be served. The trade was liable already. It was only a question of fixing the assessment upon its owner. The present case, on the other hand, had (almost inevitably) been presented to us as one in which liability depended on residence. Upon analysis, however, we think that this is not so. The liability is in respect of interest charged under Case III. of Schedule D upon the recipient, who is the appellant's wife, and is assessable upon him by the well known rule. Residence has nothing to do with it. It is the exemption that depends on residence, and it is confusing, but irrelevant, to remember that if the wife had not been ordinarily resident here the War Loan interest would have ceased to attract liability ; but since this exemption did not apply (and it has, of course, nothing at all to do with the bank interest) we may dismiss from our minds all the questions which arise in matters of residence. By so doing we see that *Tischler* v. *Apthorpe* (1) helps us one stage, at any rate, to a decision. That case does decide that where there is a liable subject-matter, residence of the assessable person is not necessary for the proper service of notices of assessment. Tischler's trade was liable. He was not a resident. Yet he was assessable. The Court must have read the rules of the old Act, which are similar to the rules of the 1918 Act, in such a way that it was not confused by the use of the word ' reside ' in them. This word, recurring one way or another in ss. 101, 102, 103, r. 4, and elsewhere, in connection with assessment, cannot, therefore, in our opinion, have the meaning of residing

(1) (1885) 2 Tax Cas. 89.

in such a way as to be within the charge of Schedule D. The taxpayer, if assessable, may be assessed where he is—that is what the rules come to. *Tischler* v. *Apthorpe* (1) does not, however, make it clear which of several places is the right one.

Applying this to the present case we may say, shortly, that a recipient of War Loan interest or bank interest may be assessed where he or she is. We have next to decide where a husband is to be assessed when the wife is such a recipient. Can he be assessed wherever he 'is' or, as in the case of these assessments, 'was'? Whether with his wife or not? We answer this by saying that he can. First, as to the place where the husband was with his wife, at her usual place of residence, the assessor would have gone to her for a return. She would quite properly have turned to her husband and said—'It is for you to look after this,' and if the assessor had then served him how could he have resisted it? And if he was liable at the time, he is liable afterwards. (*Kelly* v. *Rogers*, Income Tax Leaflets, 803 and 819.) Next, as to the assessments, put before us at the place where the appellant certainly was, though without his wife, can we distinguish this case? In our opinion we cannot say that these assessments are wrong, and we must confirm them."

J. Millard Tucker K.C. (*P. L. E. Rawlins* with him) for the appellant. The appellant can only be assessed if he comes within the terms of r. 4, sub-r. 5. That sub-rule is limited to persons who are resident in the United Kingdom, and as the appellant has been expressly found to be not resident in this country, and not to be carrying on any trade, profession or vocation here, sub-r. 5 cannot apply to the appellant. Rule 4, which has replaced s. 106 of the Act of 1842, has in effect been held by the House of Lords to be exhaustive as to the places of assessment: see *Kensington Income Tax Commissioners* v. *Aramayo.* (2) In the circumstances this is one of those cases where the machinery of assessment fails. Under r. 5 of the General Rules there is power to assess a non-resident through an agent, but a wife cannot be assessed in

(1) 2 Tax Cas. 89.

(2) [1916] 1 A. C. 215; 6 Tax Cas. 613.

respect of her own income as agent for her husband. She is not such a general agent as is mentioned in General Rule 5. The Crown meet my argument by a reference to s. 102, sub-s. 3—a section not often invoked. The whole of that section deals with persons resident in the United Kingdom who may move from one parish to another. It presupposes that they are resident in the United Kingdom, and therefore assessable. The whole scheme of the Income Tax Acts is that the assessment shall be local, or territorial. The person must be resident, and if he is resident you have to look for the district in which he is to be assessed. The decision in *Tischler* v. *Apthorpe* (1) was based upon the fact that the person was carrying on a trade in this country. There was no need in that case to deal with the question of residence, because the person was assessable and chargeable at the place where the trade was carried on.

Sir Donald B. Somervell A.-G. and *R. P. Hills* for the respondent. "Residence" or "reside" is used in more than one sense in the Income Tax Acts. There is residence for the purpose of chargeability and residence for the purpose of collection. "Residence" or "reside" cannot possibly have the same meaning in each case: see *Levene* v. *Commissioners of Inland Revenue* (2) and *Lysaght* v. *Commissioners of Inland Revenue.* (3) The present case and *Tischler* v. *Apthorpe* (1) are on all fours. Here there is a non-resident owning taxable income, and in *Tischler* v. *Apthorpe* (1) it was held that if a non-resident who owned taxable property came into this country he could be assessed. Sect. 102, sub-s. 3, literally covers the present case, and, having regard to the admitted fact that persons who are non-resident in the chargeable sense are in many cases liable to tax, there is no sort of ground for not applying s. 102, sub-s. 3, to the facts now under consideration.

Lawrence J. In this case the appellant, Mr. Duckworth, has been assessed in respect of his wife's War Loan interest, bank interest and National Savings Bond interest, and he appeals against that assessment. The appellant has been found not to be resident in the United Kingdom. His wife, on the other hand, although she has been found to be a married woman living with her husband, has also been found to be ordinarily resident in the United Kingdom. She, in the first instance, was assessed to tax in respect of this interest, but on her appeal (*Browning* v. *Duckworth* (1)) it was held that the assessment had been improperly made on her, because, under r. 16 of the General Rules, as she was a married woman living with her husband, the income tax had to be assessed upon her husband and not upon her. In those circumstances her husband has been assessed, and he now appeals from the assessment.

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(1) 2 Tax Cas. 89.
(2) [1927] 2 K. B. 38; 13 Tax Cas. 486.
(3) [1927] 2 K. B. 55; 13 Tax Cas. 511.

The argument that has been presented to me on behalf of the appellant is that as he is not resident within the United Kingdom he is not assessable. It is admitted, of course, that a non-resident may be chargeable to income tax, but it is said that only residents are assessable, and reliance is in the first place put upon the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo* (2), in which their Lordships held that ss. 106 and 108 of the Income Tax Act, 1842, then in force, were exhaustive. They were in that case dealing with foreign income, which it was provided by s. 108 fell to be assessed at the four principal ports of the United Kingdom—namely, London, Liverpool, Glasgow and Bristol. Their Lordships held that those two sections, when read together, were exhaustive, and that the taxpayer could only be assessed in respect of his foreign possessions or income at one of those four ports, and could not be assessed in any other port of the United Kingdom, although he might have a residence in some other part of the United Kingdom. It was argued for the appellant here that, similarly, the present r. 4 of the Miscellaneous Rules applicable to Sch. D of the Act of 1918, which deals with the place of assessment, is exhaustive, and is confined to persons resident in the United Kingdom. The particular sub-rule which is applicable is

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(1) [1935] 1 K. B. 605; 19 Tax Cas. 149.
(2) [1916] 1 A. C. 215; 6 Tax Cas. 613.

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sub-r. 5, which provides that: "Every other person not hereinbefore described shall be assessable and chargeable in the parish where he resides at the time of the issue of the general notices under this Act, or where he first comes to reside after the time of the issue of those general notices." It is said on behalf of the appellant that that is the only rule which is applicable to him, and that as it has been found he is not resident within the United Kingdom he cannot be assessed.

The Commissioners have found that the appellant is assessable under s. 102 of the Income Tax Act of 1918. The appellant's reply to that finding is that in view of the decision in *Kensington Income Tax Commissioners* v. *Aramayo* (1) that section, which does not appear to have been referred to by counsel arguing before the House of Lords, or by any of the learned Lords who dealt with the case, ought to be read as applicable only to residents in the United Kingdom.

Lastly, Mr. Tucker distinguished *Tischler* v. *Apthorpe* (2), upon which the Commissioners and the Crown relied in this case, on the ground that that was a case dealing with a person who, although not resident in the United Kingdom, was admittedly exercising a trade within the United Kingdom, and that the fact that he was exercising a trade within the United Kingdom might be regarded as in a sense equivalent to residence for the purpose of assessment, and so rendered him liable to assessment, although the basis of the decision was that s. 41 of the Act of 1842 (which is now General Rule 5 of the Act of 1918) did not, by providing that a person who was not resident might be assessed in the name of his agent, imply that the non-resident himself might not also be assessed.

It has been pointed out in a number of cases that the words which are used in the Income Tax Acts are not always used in the same sense, and it has also been pointed out in *Levene* v. *Commissioners of Inland Revenue* (3) and *Lysaght* v. *Commissioners of Inland Revenue* (4) that that is particularly

(1) [1916] 1 A. C. 215; 6 Tax Cas. 613.
(2) 2 Tax Cas. 89.
(3) [1927] 2 K. B. 38; 13 Tax Cas. 486.
(4) [1927] 2 K. B. 55; 13 Tax Cas. 511.

so with reference to the word "residence." It is not necessary for me to express any opinion in this case as to the meaning of the word "residence" in r. 4; but in my opinion it is impossible to decide this case upon the suggestion made on behalf of the appellant that the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo* (1) is a decision that r. 4 is exhaustive and prevents a reference to s. 102 of the Act of 1918. It is in my opinion impossible to read the judgment of the House of Lords in that sense, and s. 102 of the Act of 1918 has therefore to be dealt with. When it is dealt with and contrasted with r. 4, sub-r. 5, of the Miscellaneous Rules, it appears to me clear that s. 102 cannot be confined to persons who are resident in the United Kingdom. The words of s. 102 are perfectly general: "If any person shall come into a parish in which he has not been charged to tax, the assessor, collector, or surveyor may give him notice in writing . . . .", and sub-s. 3 provides: "If in any case a person who is, or who resides, in any parish has not been assessed therein, the commissioners acting for the parish may assess him . . . ." There you have a clear contrast between a person who "is" in the parish and a person who "resides" in the parish, and when that is read in conjunction with r. 4, sub-r. 5, of the Miscellaneous Rules it is clear, in my judgment, that persons who are not resident in the United Kingdom are liable to assessment whenever they come into the United Kingdom. That is in accordance with the decision in *Tischler* v. *Apthorpe* (2), and it seems to me to be a perfectly logical construction of s. 102, having regard to the admitted fact that non-residents are chargeable to income tax in respect of certain sources of income.

I am therefore of opinion that the decision of the Commissioners in this case was right, and the appeal must be dismissed with costs.

Solicitors for appellant: *Wm. Webb & Sons.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1916] 1 A. C. 215; 6 Tax Cas. 613.
(2) 2 Tax Cas. 89.

A. W. G.

1937
March 19,
22, 24.

ALLEN AND ANOTHER *v.* TREHEARNE (H.M. INSPECTOR OF TAXES).

Revenue—Income Tax—Profits or emoluments of office or employment under Sch. E—Sum payable on termination of office—Office terminated by death—Assessment of executors in respect of terminal payment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 18—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 45, *sub-ss.* 5 *and* 6.

By r. 18 of the All Schedules Rules, Income Tax Act, 1918, it is provided that: "Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made . . . . upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

By s. 45, sub-s. 5, of the Finance Act, 1927: "Where in any year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend chargeable under Schedule E, tax shall be charged for that year on the amount of his emoluments for the period beginning on the sixth day of April in that year and ending on the date of the cessation . . . ." and

By sub-s. 6: "In the case of the death of a person in whose case, if he had not died, tax would, under the provisions of the last preceding sub-section, have become chargeable for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate."

Percy Murray at the time of his death held the office of managing director of a limited company under a service agreement dated October 20, 1931. The period of service was for ten years certain from August 1, 1930, and the agreement provided that in addition to salary and commission there should be payable by the company to the managing director a sum of 10,000*l.* upon the final termination, from any cause whatsoever (other than wilful default in the performance of his duties), of his service with the company, which sum the managing director agreed to accept in lieu of expectation of pension. Percy Murray died on January 17, 1934, and on July 5 of the same year the company paid to the appellants, as executors of the deceased, the sum of 10,000*l.* The assessment under appeal was made upon the executors to charge this sum:—

Held, that under sub-s. 6 of s. 45 the Commissioners had only to see whether if the person had not died tax would have been chargeable on the sum in question under sub-s. 5, and were not required to make any other supposition, and that the assessment had been properly made on the executors.

APPEAL by way of Case stated by the Commissioners for the Special Purposes of the Income Tax Acts, confirming an assessment to income tax under Sch. E for the year ending April 5, 1934, made upon the appellants, Frederick Allen and Stephen Murray, as executors of the will of Percy Murray, deceased, in respect of a sum of 10,000*l.* paid under a terminal clause in an agreement of service.

Percy Murray at the time of his death held the office of managing director of Lewis Berger & Sons, Ld., under a service agreement dated October 20, 1931. The period of service was ten years certain from August 1, 1930. A clause of this agreement provided that the company should pay to the managing director by way of remuneration for his services (*a*) a fixed salary; (*b*) a commission on the net profits of each year of the company and its subsidiaries as therein defined; and (*c*) a terminal sum of 10,000*l.*, with an addition thereto at the rate of 800*l.* for each year of service after July 31, 1935, to be payable by the company to Percy Murray or his personal representatives upon the final termination from any cause whatsoever (other than wilful default in the performance of his duties) of his service with the company. It was set out in the clause that in fixing this terminal payment the company had taken account of the long service rendered by Percy Murray to the company in one capacity or another, and that the managing director would accept it in lieu of expectation of pension.

Percy Murray died on January 17, 1934, and on July 5, 1934, the company paid to the appellants, as his executors, the sum of 10,000*l.* in accordance with the clause of the agreement. The assessment appealed against was made upon the appellants to charge this sum.

The Commissioners stated their decision in the following terms:—

"Upon the death of Percy Murray his office ceased and thereupon the sum of 10,000*l.* became payable by the

Company to his executors. Although Percy Murray did not become entitled to this sum at any moment during his lifetime it was, in our opinion, a profit of his office for the year in which he died. Are, then, his executors liable to be assessed? We hold that they are, under sub-s. 6 of s. 45 of the Finance Act, 1927. In the case of the death of a person holding an office or employment sub-s. 5 comes into play and fixes the amount of the charge. Sub-s. 6 is not, in our opinion, to be read as raising the hypothetical question of what would have been the charge supposing the deceased had not died but had ceased to hold the office or employment for some other cause. It is simply in aid of the charge which is ascertained under sub-s. 5 and provides—in terms which, it is true, are elliptical—that the tax which has become chargeable under sub-s. 5, and which would have become chargeable upon the deceased if he had not died, shall be assessed and charged upon his executors. We confirm the assessment."

Raymond Needham K.C. and *Terence N. Donovan* for the appellants. The appellants represent the deceased. Income is not income until it is received, and, in the events which have happened, the deceased was never entitled to this 10,000*l.* at any moment of his life. The Revenue Authorities had to find some one to assess, so they assess the executors. They are the persons who, in virtue only of the agreement, are entitled to the money. But the taxpayer must possess the source of income, in this case the office of managing director, and that source the taxpayers do not hold. That source came to an end when the deceased died. It is an odd thing to assess executors in respect of a liability which was never a liability of the deceased. It is submitted that the 10,000*l.* is a capital asset. Rule 18 of the All Schedules Rules does not apply, because the 10,000*l.* never "accrued to" the deceased before his death within the meaning of that rule.

[LAWRENCE J. But it was accruing all the time.]

No. The right to it was in existence, but it was not accruing from day to day. The case which is contemplated by s. 45, sub-ss. 5 and 6, of the Finance Act, 1927, is that of a person who ceases to hold office and then dies. Sub-s. 5 in terms deals with the case in which there is some one left to assess, and that means no death. Sub-s. 6 only operates in a case which but for the death would have been within sub-s. 5, and it is submitted that the proper deduction is that sub-ss. 5 and 6, read together, only cover the case where there is a cessation produced from some cause other than death and the person dies subsequently. No case of death is provided for by sub-s. 5, because the whole of that sub-section is focussed upon a person who is "there." It merely fixes the proportion of the income which had fallen due to the deceased and which was to be taxed. The 10,000*l.* was, no doubt, not payable only in the event of death, for it would have been payable on resignation; but none of the facts which would have produced income to the deceased arose. The 10,000*l.* might have been income, but in fact was not, and it could not be said that if the deceased had not died this tax would have been chargeable, for he might have been dismissed for misconduct, in which case the money would never have become payable to him.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The office of the deceased in fact terminated from a cause which, under the agreement, made this sum payable, and it was a sum paid by way of remuneration for his services in that office, within r. 1 of the Rules Applicable to Sch. E. It was part of his emoluments of office and therefore chargeable to tax, and one would expect to find machinery adequate to recover it. The liability being in existence "it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable"—per Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners*. (1) In the events which have happened, by s. 45, sub-ss. 5 and 6, of the Finance Act, 1927, tax became payable on the emoluments which accrued to the deceased from April 6 to the date of the cessation of his office—namely, that of his death. The fallacy in the argument for the appellants

(1) [1926] A. C. 37, 52; 10 Tax Cas. 88, 110.

is that it assumes that this sum became payable because of the death of the deceased, whereas it became payable because of the cessation of his office. By his death the deceased, by the terms of his agreement, had earned the sum.

Cur. adv. vult.

1937. March 24. LAWRENCE J. In this case the appellants are the executors of Mr. Percy Murray, who was managing director of Lewis Berger & Sons, Ld., up to the time of his death on January 17, 1934. Under the agreement which he had with Lewis Berger & Sons, Ld., he was entitled to payment to himself or his executors of 10,000*l.*, and certain other sums after a certain date, upon the final termination, from any cause whatsoever (other than his wilful default in the performance of his duties), of his service as managing director.

The appellants received the sum of 10,000*l.* in pursuance of this agreement on July 5, 1934, and the question I have to determine is whether they can be assessed to income tax on that sum—a question which depends upon the construction of General Rule 18, and s. 45, sub-ss. 5 and 6, of the Finance Act, 1927.

It is contended for the appellants that s. 45, sub-s. 5, of the Act of 1927 does not contemplate death, and that sub-s. 6 only applies to cases where a person ceases to hold office and dies thereafter; secondly, that the 10,000*l.* did not come to deceased as his income, and therefore is not liable to tax; and, lastly, that it cannot be said that if he had not died tax would under the provisions of sub-s. 5 have become chargeable, because he might have ceased to hold his office from misconduct, in which case he would not have received the 10,000*l.*, and would not have become chargeable to tax on that sum.

I am of opinion that these contentions are unsound. In my opinion, under sub-s. 6 the Commissioners have to see whether if the person had not died tax would have become chargeable under sub-s. 5 in the circumstances which have

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happened. They are not directed to make any other supposition, except that the deceased has not died. For the rest, the facts which have actually happened, namely, that he has ceased to hold office and has received or become entitled to certain emoluments, must be looked to and the same tax charged upon his executors as would have been charged upon him.

If the Commissioners are not to have regard to the facts as they have happened, to what are they to have regard? They might suppose anything, and the sub-section only refers to the one supposition, namely, that the deceased had not died, and gives no other guidance. The fact that the deceased could never have received the 10,000*l.* himself if he died in office is in my view irrelevant, since the sub-section directs that the tax is to be chargeable as if he had not died. I cannot read the sub-section as confined to cases in which the deceased has ceased to hold office before his death, since its terms seem to me to include the case where he ceases to hold office by reason of death. Nor do I think that it is proper to have regard to any fact which has not occurred, except the death.

I therefore agree with the decision of the Commissioners, and dismiss the appeal with costs.

Solicitors for the appellants: *Windybank, Samuell & Lawrence.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

A. W. G.

1937
Mar. 23, 24.

ATTORNEY-GENERAL *v.* DICKINSON AND BARON.

Revenue—Estate duty—Settled property—Accumulations—Aggregation with other property—" Property . . . . in which the deceased never had an interest "—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 4.

The deceased transferred certain stocks and shares to trustees on trust to accumulate the income thereof at compound interest during a certain period by way of accretion to the settled fund, and after that period to deal with that fund on certain trusts for the benefit of others. The income was so accumulated for several years. On the death of the deceased the Commissioners contended that for determining the rate of estate duty the said accumulations should under s. 4 of the Finance Act, 1894, be aggregated with the rest of the settled property passing on the death, and that they were not property in which the deceased " never had an interest " within the meaning of the proviso to that section :—

Held, that the contention of the Commissioners was correct.

INFORMATION by the Attorney-General on behalf of the Crown.

The object of this information was to have it determined whether upon the death of John Stansfield (" the deceased ") the accumulations of the property settled by him which arose in the lifetime of the deceased ought to be aggregated with the other property passing on the death of the deceased or ought to be treated as an estate by itself for the purpose of estate duty.

By a settlement dated October 8, 1924, and made between the deceased of the one part and the defendants (" the trustees ") of the other part after reciting that the deceased had transferred to the trustees the stocks and shares therein specified it was witnessed that the trustees should stand possessed of the said stocks and shares and the investments for the time being representing the same (" the settled fund ") upon the trusts following :—

(i.) During the period of twenty-one years if the deceased should so long live the trustees should accumulate the income of the settled fund at compound interest by way of accretion to the settled fund.

(ii.) After the expiration of the said period or the death of the deceased (whichever should first happen) the trustees should pay the income of the settled fund to the deceased's daughter, then Helen Margaret Baron Stansfield, spinster, but afterwards Helen Margaret Baron Harwood, wife of Charles Frederick Harwood, during her life for her separate use without power of anticipation.

(iii.) After the death of the said Helen Margaret Baron Harwood and subject to any interest for life or any less period which she might appoint to a surviving husband the trustees should stand possessed of the settled fund in trust for her children or remoter issue as she should by deed or will appoint and in default of appointment in trust for all her children who should attain the age of twenty-one years or being female marry in equal shares.

(iv.) If there should be no child of the said Helen Margaret Baron Harwood who should attain the age of twenty-one years or being female marry then subject to the trusts, powers and provisions thereinbefore contained the trustees should (in the events which happened) stand possessed of the settled fund in trust for such person or persons as the said Helen Margaret Baron Harwood should by will appoint and in default of and subject to such appointment for her statutory next of kin.

The said Helen Margaret Baron Harwood and Charles Frederick Harwood were married on April 30, 1930. From the date of the settlement until the death of the deceased the trustees duly accumulated the income of the settled fund at compound interest in pursuance of the provision in that behalf contained in the settlement.

The deceased died on November 30, 1932, and since that time the defendants had paid or accounted for the income of the settled fund and of the accumulations thereof to the said Helen Margaret Baron Harwood. At the death of the deceased the principal value of the settled fund exclusive of the accumulations was 22,188*l.* 6*s.* and the principal value of the accumulations was 9411*l.* 19*s.* 7*d.*

In the foregoing circumstances it was admitted during the argument by the defendants that upon the death of the

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deceased estate duty became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the settled fund (including the accumulations) as property passing on his death.

The Commissioners of Inland Revenue contended that for the purpose of determining the rate of estate duty to be paid on the death of the deceased the settled fund (including the accumulations) ought under s. 4 of the Finance Act, 1894 (1) to be aggregated so as to form one estate with the other property which passed upon the death of the deceased.

The principal value of such other property was 63,609*l.* 2*s.*, making, together with the principal value of the settled fund (including the accumulations), an aggregate principal value of 95,209*l.* 7*s.* 7*d.* and the appropriate rate of duty upon the footing contended for by the Commissioners of Inland Revenue was therefore 19 per cent. under s. 33 and Sch. II. of the Finance Act, 1930 (20 & 21 Geo. 5, c. 28.)

The defendants as the trustees under the settlement were the persons accountable for the duty, but they refused to deliver an account or pay duty upon such footing and contended that the accumulations were not aggregable with the remaining property which passed upon the death of the deceased, but formed an estate by itself.

The Attorney-General accordingly prayed that it might be declared that for the purpose of determining the rate of estate duty to be paid on the death of the deceased the settled fund, including the accumulations, ought to be aggregated so as to form one estate with the other property which passed upon the death of the deceased.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown.

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(1) By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof: Provided that any property so passing in which the deceased never had an interest . . . . shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof. . . . ."

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It is contended for the defendants that these accumulations ought not to be aggregated under s. 4 of the Act of 1894, because the deceased never had an interest in them within the meaning of the proviso to that section—in other words he never had an interest in his own property. It is contended for the Crown that even although a man cannot himself enjoy it he must have an interest in any property he settles, otherwise he could not settle it. It is of the essence of property that it produces interest, and as the deceased, before the settlement, owned these stocks and shares he had an interest in their products, just as, if he had settled a mare, he would have an interest in her progeny, or in the fruit of an orchard. It is true that in *Attorney-General* v. *Lloyds Bank* (1) the then Attorney-General expressly conceded this point, but it is submitted that he was wrong in so doing. In *Attorney-General* v. *Pearson* (2) Rowlatt J., dealing with s. 4, held that a man has an interest in money payable under insurance policies after his death.

[LAWRENCE J. But there the interest arose out of a contract ; in the present case, if interest did exist, it did so from the nature of the property.]

In *Attorney-General* v. *Quixley* (3) the Court of Appeal held that a teacher had an interest in a gratuity payable, in return for her services, to her personal representatives after her death. And in *In re Thorley* (4) it was held that the profits of a business made after the death of the testator, the owner of the business, were part of his estate. There, although there never was a possibility of the testator himself enjoying these profits, it was held that he had an interest in them. A man has an interest, not only in his property, but in the future fruits of it.

[Buckley on Companies, 11th ed., p. 135, and Austen-Cartmell's Finance Acts, 1894–1910, 5th ed., p. 51, were also referred to.]

Fergus Morton K.C. and *A. Andrewes Uthwatt* for the defendants.

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(1) (1934) 151 L. T. 268, 271.

(2) [1924] 2 K. B. 375.

(3) (1929) 98 L. J. (K. B.) 652.

(4) [1891] 2 Ch. 613.

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Sect. 4 imposes a tax on the subject "and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used"—per Lord Warrington of Clyffe in *Adamson* v. *Attorney-General.* (1) Therefore if there is any doubt in this case it should be decided in favour of the defendants. The settlement here is in very common form, yet this point has never before been taken by the Crown. The deceased, as settlor, never had any interest in these accumulations, because by settling them he cut himself off from the right to receive them. *In re Thorley* (2) is not in point, it being a decision on legacy duty. It is one thing to say that a man can direct what shall be done with interest when it accrues; it is another to say that he has an interest therein. If these accumulations had been invested in land then it would follow from the argument for the Crown that the settlor would have an interest in the land. But such an interest in land is unknown to the law. The distinction drawn by Rowlatt J. in *Attorney-General* v. *Pearson* (3) between policies and policy money is of assistance to the defendants. In *Attorney-General* v. *Lloyds Bank* (4) not only did the Attorney-General concede the point, but Finlay J. made a declaration in conformity thereto and both the Court of Appeal and the House of Lords (5) confirmed it. It is hardly conceivable that that declaration would have been made if the point now taken by the Crown is a good point. Declarations are not made unless the Court is satisfied after full consideration that they are correct. Declarations cannot be made by consent.

In *Attorney-General* v. *Quixley* (6) the gratuity was the teacher's gratuity, given in return for her services, before, but not payable until after, her death, and therefore formed part of her estate. In the illustration of the mare and foal by the Attorney-General, the settlor could not say "I have an interest in the foal," nor could he say "I once had an interest in the foal."

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(1) [1933] A. C. 257, 275.
(2) [1891] 2 Ch. 613.
(3) [1924] 2 K. B. 375.
(4) 151 L. T. 268, 271.
(5) [1935] A. C. 382.
(6) 98 L. J. (K. B.) 652.

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Sir Donald Somervell A.-G. replied.

L. W. Byrne for trustees.

Cur. adv. vult.

1937. March 24. LAWRENCE J. read the following judgment: The only question argued before me was whether the deceased ever had an interest within the meaning of s. 4 of the Finance Act, 1894, in the accumulations of income settled by him under a deed of October 8, 1924. It was admitted by Mr. Fergus Morton on behalf of the defendants that these accumulations of income were property passing on the death of the deceased within the meaning of s. 1, and I decide the case upon the footing of that admission.

It was contended on behalf of the Crown that every owner of property has an interest within the meaning of s. 4 in the fruits of his property, because it is inherent in ownership that the owner can dispose of both the property and its fruits, and can therefore realize the benefit of the fruits before they come into existence; and reliance was placed upon *Attorney-General* v. *Pearson* (1); *Attorney-General* v. *Quixley* (2), and *In re Thorley.* (3)

On behalf of the defendants it was contended that these cases were not decided upon s. 4 and are in any event distinguishable from the present case; *Pearson's* case (1) because the settlor there reserved an ultimate trust to himself; *Quixley's* case (2) because the testator there was competent to dispose of the gratuity up to the time of her death; and *Thorley's* case (3) because it was a decision upon legacy duty.

It was further argued that the facts that the then Attorney-General had conceded the very point now argued in the case of the *Attorney-General* v. *Lloyds Bank* (4), and, as was suggested, that the late Mr. Austen-Cartmell had taken the same view in his book on the Finance Acts, 1894–1910 (Death Duties), 5th ed., p. 51, indicated that the question must be one of doubt and ought therefore to be answered in favour of the taxpayer.

(1) [1924] 2 K. B. 375, 388.
(2) 98 L. J. (K. B.) 652.
(3) [1891] 2 Ch. 613.
(4) 151 L. T. 268, 271.

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In my judgment, however, the contention of the Crown is right in principle and is supported by the reasoning in *Thorley's* case (1). *Thorley's* case (1) is an authority for the proposition that the bequest of an annual sum out of the future profits of a business bequeathed by the testator is liable to legacy duty under s. 4 of the Stamp Duties Act, 1845 (8 & 9 Vict. c. 76), because, though only to arise in the future, it was part of the testator's estate; and in my opinion it is impossible to say that a man has no interest within s. 4 of the Finance Act, 1894, in what is part of his estate. I agree with the reasoning of that decision and on principle I am of opinion that the fruits of property are so far inherent in the property that the owner of the property has by virtue of his ownership a beneficial interest in the fruits of the property. In realizing or disposing of the property he is realizing or disposing of its capacity to produce fruits. It follows that the testator in the present case had a beneficial interest in the accumulations of the income of the stock and shares in question when he settled them, and they must be aggregated with his other property, since it is clear that an interest within the meaning of s. 4 includes a beneficial interest.

Being of this opinion, I see nothing in the concession of the then Attorney-General in *Attorney-General* v. *Lloyds Bank* (2) or in the suggested view of Mr. Austen-Cartmell to prevent my acting upon my own opinion.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Littledale & Lefroy, for Southern, Ritchie & Southern, Burnley.*

Solicitors for trustees: *Broad & Son.*

(1) [1891] 2 Ch. 613.

(2) 151 L. T. 268, 271.

W. L. L. B.

PALMER *v.* CATTERMOLE.

1937
April 16, 19

Revenue—Income tax—Omission of testator to deliver statement of profits—Assessment of executrix in respect thereof—Inclusion therein of income of testator's wife—Profits accruing before year of assessment—" Profits . . . . which arose or accrued to him before his death "—Apportionment of profits arising in year of death—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 16, 18.

A testator died during the year of assessment, leaving a widow, without having delivered a statement of his profits or gains chargeable to tax, and an assessment in respect thereof was accordingly made on his executrix, the appellant, under the provisions of r. 18 of the All Schedules Rules to the Income Tax Act, 1918 :—

Held, first, that the income of the testator's wife " arose or accrued " to him within the meaning of the rule and must be included in the income to be so assessed, this being a question of assessment and collection and not of computation.

Leitch v. *Emmott* [1929] 2 K. B. 236; 14 Tax Cas. 633, distinguished.

Held, secondly, that the executrix was assessable in respect of the profits and gains so arising or accruing to the testator before the year of assessment and not only of those arising or accruing to him during the year of assessment.

And *held,* thirdly, that the said profits which arose to the testator de die in diem from the commencement of the year of assessment up to the time of his death in that year were apportionable.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts under s. 149 of the Income Tax Act, 1918.

The appellant, Mrs. Helen Palmer, as executrix of the will of Captain Richard Elliott Palmer (" the testator "), appealed against assessments to income tax under Sch. D for the years 1925–1926, 1926–1927, 1927–1928, 1928–1929, 1929–1930, 1930–1931 and 1931–1932, made on her in respect of the income of the testator and his wife from untaxed income from foreign possessions. All questions as to figures had been agreed.

The following facts were admitted: The testator died on August 22, 1931. He had made no proper returns of his income for the years in question. His widow died on June 5, 1934. During the years above mentioned, down to the testator's death, he and his wife were living together. No question arose as to the testator's own income for the year 1931–1932, the year in which he died.

It was contended for the appellant that (*a*) as executrix of the testator she was not assessable to income tax in respect of the profits of the wife of the testator for any year of assessment; (*b*) that the assessment of the appellant authorized by r. 18 of the All Schedules Rules to the Income Tax Act, 1918 (1), was restricted to the profits or gains which arose or accrued to the testator before his death and did not extend to the profits or gains which arose or accrued to the testator's wife; (*c*) that r. 18 (1), as extended by s. 29 of the Finance Act, 1923 (2), authorized the assessment of the appellant in respect only of those profits or gains which arose or accrued in the year of assessment within which the testator died; and (*d*) that no assessment could be made on the appellant in respect of the income of the wife of the testator for the year 1931–1932 because by reason of his death on August 22, 1931, his wife was not for the whole of that year a married woman living with her husband.

It was contended for the Crown that the assessments were correct.

The Commissioners were of opinion that the appellant, the executrix, was properly assessed in respect of the income of the testator's wife for all the years in question up to and including April 5, 1931, and that for the year ending April 5, 1932, the appellant was only liable in respect of the income of the testator's wife up to the date of his death, August 22, 1931, to be apportioned, where the wife's income was calculated on the previous year's income, on a time basis up to the testator's death, and, so far as the wife's income was computed on actual income of that year, to be that actual income to the date of the testator's death.

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), General Rules Applicable to Schs. A, B, C, D and E. Rule 16: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that (I.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee. . . . ."

Rule 18: "Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within three years after the expiration thereof, upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

(2) 13 & 14 Geo. 5, c. 14. Not material to this report.

The executrix appealed.

J. Millard Tucker K.C. and *J. S. Scrimgeour* for the appellant. The only statutory provision for assessing the executrix is r. 18 of the All Schedules Rules. (1) Under that rule the executor of a deceased person is assessable in respect of income arising to the testator. *Leitch* v. *Emmott* (2) shows that the wife's income "arises" to her, though for purposes of collection it is "deemed" under r. 16 of the All Schedules Rules (1) to be the husband's. But r. 16 does not extend to an executor. There is no provision in r. 18 for assessing the executor except for the year of assessment in which the testator died. Therefore the assessments for the earlier years are wrong.

There is no provision for splitting up the year of death. In *Cowdray* (*Viscountess*) v. *Inland Revenue* (3) Rowlatt J. held that the super-tax of the deceased husband could be apportioned to the date of death, but could find no basis for splitting the super-tax of the surviving wife. In the case of income tax there is no machinery for splitting the tax even of the deceased husband.

R. P. Hills (*Sir Terence O'Connor S.-G.* with him) for the Crown. For all purposes the year of assessment must be looked at. A man who was single and resident in the year of assessment does not become entitled to relief because he has married or become non-resident since the year of assessment. It is not correct to say that the wife's income is aggregated to that of her husband for the purpose of calculating the rate of tax; it is aggregated for the purpose of calculating the amount of income liable to tax at whatever rate is applicable. *Leitch* v. *Emmott* (1) simply decided that when one looked at the income of the previous year to see what was the income for the purpose of the tax year one was not taxing the previous year. In *Brooke* v. *Inland Revenue* (2) the appellant was assessed to super-tax. She objected that during the year of measure, namely, the previous year, she was a married woman living with her husband, and that, consequently, the income would be charged in the name of the husband. But Atkin J. held that the profits being charged were those in the year of assessment, in which year she was no longer a married woman living with her husband, for she was then living apart from him, and therefore were not to be deemed his.

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(1) See note (1) ante, p. 582.

(2) [1929] 2 K. B. 236; 14 Tax Cas. 633.

(3) (1930) 15 Tax Cas. 255.

The words "his profits or gains" in r. 18 must include the profits and gains which "shall be deemed" to be his under the provisions of r. 16.

Where tax is based on the year of charge there is no provision for scaling the tax down because of the tax-payer's death during that year. And where the tax is based on the income of the previous year the same principle applies. In *Cowdray* (*Viscountess*) v. *Inland Revenue* (3) Rowlatt J. only said that the particular assessment was not correct; he did not say that Lady Cowdray was not assessable, but that he did not see how an assessment could be made.

Tucker K.C. in reply. This is the converse of the *Cowdray* case. (3) In *Elmhirst* v. *Inland Revenue* (4) it was held that although for the purposes of assessment and collection the wife's income was to be deemed that of the husband, it was still her income. To make the wife's income in this case the husband's under r. 18, the words "or were deemed to arise and accrue" would have to be read in. *Leitch* v. *Emmott* (1) causes the difficulty in this case. There Rowlatt J. held that the income of a married woman living with her husband arose to the husband, but that decision was overruled by the Court of Appeal.

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(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.

(2) [1917] 1 K. B. 61; [1918] 1 K. B. 257; 7 Tax Cas. 261.

(3) 15 Tax Cas. 255.

(4) Ante, p. 551.

There is no provision in the Income Tax Acts for apportioning the profits or gains of a broken part of a year.

[*Cowdray* (*Viscountess*) v. *Inland Revenue* (1) was referred to.]

LAWRENCE J. The appellant in this case is the executrix of Captain Palmer, and for some reason Captain Palmer did not return for the purposes of income tax certain income from untaxed interest on foreign possessions which he enjoyed. He died on August 22, 1931, without having made a proper return since 1925, and the assessment under appeal has been made upon his executrix in respect of the income which in that way was not returned. There are three points which are raised on behalf of the appellant, and they all turn primarily upon the meaning of r. 18 of the General Rules applicable to All Schedules to the Income Tax Act, 1918, and also upon the interpretation of r. 16. The first point that is raised by the appellant is that the only assessment that can be made upon her as executrix under r. 18 is upon the income of the husband excluding the income of his wife. The second point is that r. 18 only has reference to the year of assessment, the year in which the testator of the executrix died; and the third point is that in any event the Commissioners had no power to do as they have done in this case and make an assessment in respect of the year of Captain Palmer's death upon an apportionment basis, assessing him in respect of the income which they found him to have enjoyed up to the time of his death.

The first argument is put in this way. It is said that the words of r. 18: "Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time

(1) 15 Tax Cas. 255.

within the year of assessment, or within three years after the expiration thereof, upon his executors," apply solely to the income which arose or accrued to him in his own right and not to any income which arose or accrued to him in right of his wife. That interpretation of r. 18 is based upon the interpretation which the Court of Appeal put upon r. 16 in *Leitch* v. *Emmott*. (1) The position that the Court of Appeal were then dealing with was that of a lady who had become a widow a few days after the opening of a certain tax year, and she was assessed for that year in which she became a widow in respect of income from War Stock not taxed at the source, and some bank interest, and she had to be taxed under the scheme of the Acts by reference to her income for the year before. Her contention was that she had no income in the year before and therefore was not assessable to any income tax in respect of this War Stock, because by r. 16, since she was living with her husband in that year, her profits were to be deemed the profits of her husband. The Court of Appeal rejected that contention, saying that although r. 16 provides that the profits of a married woman living with her husband should be deemed profits of the husband and should be charged and assessed in his name, yet that only means for the purposes of assessment and collection, and it does not prevent those profits still being the profits of the wife for the purposes of computation. They drew attention to the fact that the substantive part of r. 16 states affirmatively that a married woman shall be assessable and chargeable to tax as if she were sole and unmarried, and only makes her profits assessable and chargeable in the name of the husband by way of a proviso. In the present case it is argued that the wife's profits did not arise or accrue to the husband within the meaning of the words in r. 18. I am unable to accept this contention. I read the judgment of the Court of Appeal in *Leitch* v. *Emmott* (1) as applying solely to what I think was actually decided, namely, the computation of tax, and here it is not a question of computation of tax, but a question of assessment and collection from

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(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.

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the executrix for tax which was assessable and chargeable upon the husband by reason of r. 16. Mr. Tucker has argued with great force that the words "which arose or accrued to him" in r. 18 are inapplicable to the income of the wife, which did not, he says, arise or accrue to him, but which arose and accrued to the wife under the charging part of Sch. D when read with the substantive part of r. 16. But I think that in interpreting those words in what is really a machinery section there is no reason for not giving them the liberal interpretation which will achieve the result of taxing the estate of the deceased in respect of profits which undoubtedly ought to have been returned and which were not returned. I therefore hold that the case of *Leitch* v. *Emmott* (1) only applies to matters of computation and that as this is not a matter of computation the executrix is under r. 18 assessable upon the profits or gains which arose or accrued to the husband in his own right and in right of his wife by virtue of r. 16.

As to the second question I can see nothing in r. 18 which in any way suggests a limitation to the year of assessment. The words are perfectly general: "an assessment in respect of the profits or gains which arose or accrued to him before his death." If the rule had been intended to limit it to the year of assessment it could quite simply have said so; but the words "before his death" are perfectly general, and therefore I am of opinion that the executrix is assessable in respect of all the profits or gains which arose or accrued to the testator within the meaning that I put upon those words "before his death," notwithstanding that they arose or accrued to him before the year of assessment. The words "may be made at any time within the year of assessment, or within three years" refer, not to the time at which the profits arose or accrued to the testator, but to the time at which the assessment may be made.

As to the last point it is said that there is no provision in the Income Tax Acts for apportioning the profits of a broken part of the year, and the case of *Viscountess Cowdray* v.

(1) [1929] 2 K. B. 236; 14 Tax Cas. 633.

Inland Revenue (1) is referred to. I am, however, of opinion that that case is not in point here and that the words of r. 18 are apt to entitle the Commissioners to assess and charge upon the executrix the profits which arose or accrued to her testator, within the meaning that I have put upon those words, de die in diem up to the date of the death.

I therefore hold that the assessment was rightly made, and the appeal will be dismissed with costs.

Solicitors for appellant: *Stephenson, Harwood & Tatham.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

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(1) 15 Tax Cas. 255.

SOUTHPORT CORPORATION *v.* LANCASHIRE COUNTY COUNCIL.

1937
April 21, 22, 23.

Local Government—Cesser of functions of poor law authority—Transfer thereof to county and borough councils—Vesting on appointed day of poor law authority's institutional property and liabilities—Adjustment in respect thereof—Payment in respect thereof as soon as practicable after appointed day—Agreement to pay interest as from appointed day—Deduction of income tax from interest—"Interest"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21*—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *ss.* 1, 113.

On the transfer on the appointed day of the functions of a poor law authority to county and county borough councils under s. 1 of the Local Government Act, 1929, the institutional property and liabilities of the authority were also so transferred under s. 113, sub-s. 2 (*a*), (*b*), and were divided between the councils, and in pursuance of sub-cl. (*d*), as soon as practicable after the appointed day an adjustment in respect of such properties and liabilities was made between the councils.

By an agreement between the said councils, under s. 113, sub-s. 2 (*d*) (ii.), a certain sum on balance became due under the adjustment from the defendant to the plaintiff council, after valuations, inquiries, etc., on a date later than the appointed day by some sixteen months, which sum included a sum which, under this agreement, was called "interest" calculated as from the appointed day. The defendant council accordingly paid over this amount, which was the aggregate of the two said sums, deducting therefrom income tax on that part of it which represented the "interest":—

Held, that the latter part was not interest within the meaning of the Income Tax Acts, but that it was an element in the calculation of the capital sum, i.e., the total sum paid over, which had to be made for the purpose of the said adjustment, and that, accordingly, the defendants had no right to deduct income tax therefrom.

SPECIAL CASE stated by the parties under Order XXXIV.

Prior to April 1, 1930, the board of guardians of Ormskirk Union was a poor law authority whose area was comprised partly within the county borough of the plaintiffs and partly within the county of the defendants. By virtue of the Local Government Act, 1929, particularly ss. 1 and 113 (1), the institutional property and liabilities of the said board of

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(1) Local Government Act, 1929 (19 Geo. 5, c. 17). Sect. 1 transferred the functions of poor law authorities to county councils and county borough councils.

Sect. 113, sub-s. 2: "Subject as aforesaid [dealing with cases where the poor law authority area guardians, on April 1, 1930, the appointed day, were divided between and transferred to the plaintiffs and defendants in accordance with an agreement between them dated March 20, 1930, made in pursuance of s. 113, sub-s. 2 (*d*) (ii.) (1) as the parties had not agreed that such an adjustment was unnecessary. Summarized with reference to the issues in this case, the agreement provided for the transfer of the institutional properties and liabilities of the Ormskirk Union to the defendants and plaintiffs respectively. It further provided for a valuation of the said properties by an officer of the Commissioners of Inland Revenue under Sch. VI. to the

is wholly comprised within one county or county borough] the following provisions shall have effect in the case of a poor law authority whose area is not wholly comprised within one county or county borough—(*a*) all institutional property of the authority shall on the appointed day by virtue of this section be transferred and vest to and in such one of the councils of the counties or county boroughs into which the area of the authority extends, or to and in two or more of those councils jointly, or to and in a joint body representing two or more of those councils, or may be divided between any two or more of those councils, as may be agreed between the councils, or, if no agreement has been arrived at two months before the appointed day, as the Minister may by order determine . . . ."

"(*b*) all institutional liabilities of a poor law authority shall on the appointed day by virtue of this section be transferred to and vest in the council or councils or joint body to which the corresponding institutional property is transferred."

"(*d*) as soon as practicable after the appointed day there shall be made, in accordance with the provisions contained in the Sixth Schedule to this Act . . . . (ii) unless the councils concerned have agreed that such an adjustment is unnecessary, an adjustment in respect of the institutional property and institutional liabilities of the authority."

Sub-s. 3: "For the purposes of this section and of the said Schedule — 'Institutional property' means all poor law institutions and offices and any other freehold or leasehold property whatsoever of a poor law authority (including any rights enjoyed in connection therewith) together with any furniture, plant, and fittings on or about any such institution offices or property, and includes any unexpended balances of loans raised in respect of institutional property and sums set apart as a sinking fund to pay off loans so raised;

'Institutional liabilities' means any outstanding liabilities for loans raised in respect of the provision, extension or equipment of any institutional property."

By s. 134 the "appointed day" was April 1, 1930.

(1) See note (1), ante, p. 589.

Act, and for payment of compensation by the Lancashire council to the Southport council and by the Southport council to the Lancashire council. By the agreement the compensation was to be calculated as follows :—

"(A) The total values of all the said institutional properties . . . . ascertained as aforesaid shall be apportioned to the Lancashire council and the Southport council respectively in the proportion which the unreduced rateable value of the portion of the area of the Lancashire council situate within the area of the said authority bears to the unreduced rateable value of the portion of the area of the Southport council so situate . . . ."

"(C) In consideration of these presents . . . . the Lancashire council will pay to the Southport council a sum equal to the portion of the said total values of the said institutional properties . . . . apportioned to the Southport council after deducting therefrom the share of the said institutional liabilities apportioned to the Southport council as aforesaid such sum to be payable on October 1, 1930, and to carry interest as from April 1, 1930, at the rate of 5*l.* per centum per annum."

Clause (D) contained a similar agreement by the Southport council.

As a result of such valuations and of the above mentioned Act and agreement there became owing on balance on August 1, 1931, from the defendants to the plaintiffs the sum of 55,379*l.* 8*s.* 8*d.* of which 3463*l.* 8*s.* 8*d.* was due in respect of the interest provided for in clauses (C) and (D) (supra). On August 1, 1931, the defendants paid the plaintiffs 54,600*l.* 3*s.* 3*d.* only, having deducted the sum of 779*l.* 5*s.* 5*d.* as being income tax at the rate of 4*s.* 6*d.* in the pound on the sum of 3463*l.* 8*s.* 8*d.* The plaintiffs contended that no part of the said sum of 55,379*l.* 8*s.* 8*d.* was interest within the meaning of the Income Tax Acts, and, therefore, that no deduction for income tax could be made either under r. 19 or r. 21 of the All Schedules Rules of the Income Tax Act, 1918, or under any other provision of those Acts, but that the whole sum was paid as compensation for the purpose of the adjustment under s. 113 of the Act of 1929, and was a payment of a capital nature.

The question for the opinion of the Court was whether this contention was correct.

Latter K.C. and *R. P. Hills* for the plaintiffs. The sum in respect of which income tax has been deducted is not interest, and under the Act there is no power to charge interest. There was a transfer of property—an adjustment, i.e., a division of existing assets: *Caterham Urban District Council* v. *Godstone Rural District Council* (1), per Lord Halsbury—and there was no question of vendor and purchaser. The sum was really compensation under the name of interest, although "compensation" does not appear in the statute, and an agreement to pay it eo nomine would have been ultra vires. Until a debt is established there cannot be interest, and on the appointed day the sums payable did not become due although on that day the properties vested in the councils. But they were not valued by the Inland Revenue official until February, 1931, and negotiations followed between the experts as to the rateable value of the old Ormskirk Union. On the appointed day there was no right of action in either party. Where the parties say "We will pay you a certain sum and an additional sum as from an antecedent date as interest," that additional sum is not interest but part of the adjustment of a capital sum. These are not revenue-producing properties, and are exempt even under Sch. A.

[*Waddington* v. *O'Callaghan* (2) was also referred to.]

The mere fact that a payment is called interest is not conclusive—*In re National Bank of Wales* (3)—and the fact that a capital sum is partly made up on a basis of interest is also immaterial.

[*Schulze* v. *Bensted* (4), *Sweet* v. *MacDiarmid or Henderson* (5), and *Simpson* v. *Maurice (Executors)* (6) were also referred to.]

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(1) [1904] A. C. 171, 173.

(2) (1931) 16 Tax Cas. 187, 197.

(3) [1899] 2 Ch. 629, 651.

(4) [1916] S. C. 188; 7 Tax Cas. 30.

(5) [1921] S. C. 92; 7 Tax Cas. 640.

(6) (1929) 14 Tax Cas. 580, 592, 601

Glover K.C. and *Ralph Etherton* for the defendants. This sum of 3463*l.* was not an element in the calculation of a capital sum because that capital sum had to be ascertained as at April 1, 1930, the appointed day, both under the Act and by the agreement. If an adjustment is required to be made, and if it emerges that one of the elements in arriving at the agreed sum is in fact calculated on a basis of interest, then, unless it can be said that although expressed in terms of interest that sum is in fact damages or compensation expressed in terms of interest, then it is what it is expressed to be—namely, annual interest within the meaning of the Income Tax Acts. It is not necessary to put the defendants' case so high, but it is desired to keep the point open.

[LAWRENCE J. There is nothing in the Act which says that the money is to be paid on the appointed day, and in many instances it could not be paid on that day.]

But it may be due. The defendants could have said: "We will take the value as on April 1, 1930, but we will not pay you for ten years, and in the meanwhile will pay you interest." Could it then have been said that that was not interest, liable to tax? The Act gives the parties the right to make any agreement they like, and there was an inherent right in them to compromise: *In re Norwich Provident Insurance Society* (1), *Dixon* v. *Evans* (2), and *Holsworth Urban District Council* v. *Holsworth Rural District Council.* (3) The defendants were entitled to receive the money at once, and not receiving it were entitled to ask for interest. This sum was not compensation or damages.

Latter K.C. in reply. Because property is valued as on a certain date it does not follow that payment is due on that date. The payment was the adjustment, and until payment there is no adjustment. Of course the parties can agree to pay interest, but they cannot agree facts which do not exist, and if no debt is due they cannot agree that a debt is due. The case finds as a fact that the debt came into existence on August 31, 1931, as the result of the valuations, the agreement and the Act.

(1) (1878) 8 Ch. D. 334.
(2) (1872) L. R. 5 H. L. 606.
(3) [1907] 2 Ch. 62.

1937

SOUTHPORT CORPORATION v. LANCASHIRE COUNTY COUNCIL.

LAWRENCE J. This is an action which is brought before me by way of a special case in which a declaration is claimed that a sum of 3463*l.* odd, part of a sum of 55,379*l.* odd, payable by way of adjustment under s. 113 of the Local Government Act, 1929, was not interest of money within the meaning of the Income Tax Act, 1918, and that the defendants are not entitled to deduct income tax from that sum, and the action also claims payment to the plaintiffs of the sum of 779*l.* odd, which was the amount deducted for income tax.

The case turns upon the construction of the Local Government Act, 1929, and, particularly, s. 113 and the Sixth Schedule to that Act, and upon the construction of the agreement between the plaintiffs and the defendants dated March 20, 1930. Under s. 1 of the Local Government Act, 1929, the old poor law authorities were to cease to exist, and the property of those authorities was to be vested, as at the appointed day, in the councils of counties or county boroughs, of whom the plaintiffs and the defendants are two. In this case, the Ormskirk Union had been the poor law authority and, under the Act of 1929, certain of the properties of the Ormskirk Union were to be vested in the plaintiffs and the defendants respectively. The statute, by s. 113, (1) provides that the institutional property of the old authority shall, on the appointed day, by virtue of the section be transferred and vest to and in such of the councils of the counties or county boroughs into which the area of the old authority extends as may be agreed between the councils or, if no agreement has been arrived at two months before the day, as the Minister may by order determine. The section also provides that the institutional liabilities of the old poor law authority shall be transferred to and vest in the council or councils to which the corresponding institutional property is transferred. Sect. 113, sub-s. 2 (*d*) (ii.), then provides that as soon as practicable after the appointed day there shall be made, in accordance with Sch. VI. to the Act, an adjustment in respect of the institutional property

See note (1), ante, p. 589.

and institutional liabilities of the authority. Sch. VI., cl. 1, provides that the adjustment "shall be made between the councils as they may agree or in default of agreement as the Minister may by order determine: Provided that for the purposes of any agreement or order . . . . the certificate of an officer of the Commissioners of Inland Revenue of the value of any institutional property shall be conclusive." By cl. 4, sub-cl. (1.) of the schedule: "Any sum required to be paid from one council to another for the purpose of effecting an adjustment under this schedule may be paid either by way of annual payments or by way of a single payment."

That statute was passed in 1929 and, in pursuance of its provisions, the plaintiffs and the defendants entered into an agreement on March 20, 1930, providing that the institutional property of the Ormskirk Union, specified in the first schedule thereto should be transferred to and vested in the defendants, and that the institutional property of the Ormskirk Union certified in the second schedule thereto should be transferred to and vested in the Southport Council. The agreement went on to provide that a valuation of all the said institutional properties should be made as on April 1, 1930, by an officer of the Commissioners of Inland Revenue in accordance with the provisions of cl. 1 of Sch. VI. to the Act, and compensation in respect thereof should be paid by the Lancashire council to the Southport council or by the Southport council to the Lancashire council calculated as follows. The calculation provided that the total values of all the institutional properties specified should be apportioned between the councils in the proportion which the unreduced rateable value of the portion of the area of the Lancashire council situate within the area of the Ormskirk Union should bear to the unreduced rateable value of the portion of the area of the Southport council so situate; and that the institutional liabilities should be apportioned in the same way as the total values of the institutional properties, and that in consideration of this agreement and the transfer and vesting of the institutional properties, the Lancashire council would pay to the Southport council a sum equal to the portion of the total values of the institutional properties after deducting therefrom the share of the institutional liabilities apportioned to the Southport council, such sum to be payable on October 1, 1930, and to carry interest as from April 1, 1930, the appointed day, at the rate of 5*l.* per cent. per annum. Then there is a similar provision with reference to the Lancashire council.

The question I have to decide is whether what is, in this agreement of March 20, 1930, described as "interest," is in reality interest within the meaning of the Income Tax Act, 1918, or is in reality an element in the calculation which had to be made for the purpose of the adjustment referred to in the Local Government Act, 1929. A number of cases have been referred to, but I do not think it is necessary for me to go through them all. They show clearly that the fact that a sum of money, which has to be paid, is called interest, is not enough to constitute it interest within the meaning of the Income Tax Act, and that the reality of the situation must be looked at. In the case of *Inland Revenue* v. *Ballantine* (1) the Lord President points out that in all such cases, "whether the allowance is wrapped up in a lump award or is separately stated in the decree—the interest calculation is used in modum aestimationis only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time." The question is in every case whether the sum which is called "interest" is in reality interest upon a debt due, or is a sum which has been arrived at for the purpose of calculating what is, in reality, a capital sum.

In the present case it is argued on behalf of the defendants that here the statute was providing for the apportionment of these assets and transferring and vesting these assets in the respective county council and county borough council as on the appointed day, and, as on that day, the debt in respect of these properties arose and, consequently, the sum which was to be paid by the one council to the other was,

(1) (1924) 8 Tax Cas. 595, 611.

in point of law, then due, and was a debt payable at that moment, any sum which the parties agreed upon as interest upon that sum was interest in the true sense, and was interest within the meaning of the Income Tax Act, 1918. It was, I think, conceded that there was nothing in the Act which specifically entitled the councils concerned to interest as from the appointed day, but it was said that they were entitled to agree upon interest and that they had so agreed in this case.

In my judgment, this argument is unsound. I am of opinion that there is nothing in s. 113 or in Sch. VI. to the Local Government Act, 1929, which in any way contemplates the payment of interest by one council to another. In the first place, as was pointed out by Mr. Hills, the statute is dealing with capital assets which belonged, before the appointed day, to neither of the councils to whom they are to be transferred. It provides that they are to be transferred to and vested in the councils as at the appointed day, but it contemplates clearly in s. 113, sub-s. 2 (*d*), that the adjustment which is to be made in respect of those properties is not to take place at the appointed day, but is to take place as soon as practicable after the appointed day. That adjustment is to include not only the valuation of the properties and the liabilities, but also apportionment in respect of the equitable interests which the council are deemed to have in the properties which are to be transferred to and vested in other councils by virtue of the Act, by reason of the fact that they have, through their ratepayers, contributed towards the cost of those properties. There is nothing in s. 113 or in the schedule which expressly refers to interest, and the fact that the statute in terms contemplates that the adjustment will be made after the appointed day and that the schedule contemplates that the figure adjusted may be paid either in one payment or by way of annual payments, seems to me to indicate that the adjustment is to be an adjustment which provides for a payment of a capital nature. The statute, by Sch. VI., cl. 1, provides that in the absence of agreement upon the adjustment, the Minister shall determine it. It appears to me to be clear that the Minister, although he might, in calculating the adjusted figure, allow something for the period of time between the appointed day and the time at which the payment of the adjusted figure was to be made, would not be entitled to give anything which was in reality interest on the sum so adjusted. In my opinion, these councils had likewise no power to agree upon the payment of interest, properly so called, between the appointed day and the day upon which the adjustment payment was to be made.

But apart from the question of their power so to agree, I am of opinion that the terms of the agreement do not indicate the intention to agree upon a payment of interest in the true sense of that word. The parties had to agree upon an adjustment, and they did so in the terms of clause 3 of the agreement, which provides that " A valuation of all the said institutional properties . . . . shall be made as at April 1, 1930, by an officer of the Commissioners of Inland Revenue in accordance with the provisions of the Sixth Schedule of the said Act," and the agreement goes on " compensation in respect thereof shall be paid by the Lancashire council to the Southport council or by the Southport council to the Lancashire council calculated as follows ". Those words are not the words of the Act, but they are in my opinion used as equivalent to the words of the Act : " an adjustment in respect thereof shall be made between the Lancashire council and the Southport council upon the following basis." Then the basis of the adjustment is set out. If that is the true interpretation of this agreement, then the provision which is contained in clause 3 (C) and (D) with reference to interest is, in the words of the Lord President, Lord Clyde, in *Inland Revenue* v. *Ballantine* (1), only in modum aestimationis and not in reality interest within the meaning of the Income Tax Act, 1918.

It is further contended on behalf of the defendants that even if that is the true view with reference to the period from April 1, 1930, up till the date when it was agreed that the adjustment should be made, namely, October 1, 1930, yet a contractual construction should be placed upon the agreement as to the time at which it was actually practicable to make the adjustment, and that after October 1, 1930, the interest is interest within the meaning of the Income Tax Act. I do not accept this contention. I think the reason why this provision was put in was, as I have said, a method of calculation at the time the agreement was made on March 20, 1930, before the appointed day had come. It was probably thought that it would have been practicable by October 1, 1930, to make the adjustment and the parties therefore incorporated the provision that the sum should be payable on that day, but in fact it was not practicable to make the adjustment at that time and it was not practicable to make the adjustment until August, 1931. I am therefore of opinion that the interest which was provided for between October 1, 1930, and the date when the adjustment was in fact made stands upon no different footing from the interest which was payable from April 1, 1930, until October 1, 1930, and that both of these sums of interest, although called "interest," are not in reality interest within the meaning of the Income Tax Act, but merely elements in the calculation of the adjustment for which the statute provides by s. 113, which was the adjustment of a capital sum and which provides for no payment by way of interest.

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(1) 8 Tax Cas. 595, 612.

Accordingly, I give judgment for the plaintiffs for the sum of 779*l*. 5*s*. 5*d*. without costs.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for R. Edgar Perrins, Town Clerk, Southport.*

Solicitors for defendants: *Norton, Rose, Greenwell & Co., for Sir George Etherton, Preston.*

W. L. L. B.

1937
April 23,
26, 27.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* SACKVILLE ESTATES, LIMITED.

[1936. E. No. 962.]

Landlord and tenant—Deduction of income tax (*Sch. A*) *from rent—Rent reduced on application under s.* 21 *of Finance Act,* 1930—*Dispute as to basis of deduction of income tax—Reference of difference to General Commissioners—Finality of decision—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 22, *sub-r.* 1 (*a*).

A building leased by the plaintiffs to the defendants was assessed to income tax (Sch. A) on the rent. Under s. 21 of the Finance Act, 1930, the sum upon which the tax was calculated was reduced on the ground that parts of the building were empty during the year of assessment, and the defendants paid tax on the reduced rent. The defendants in paying rent deducted the tax calculated on the original rent, the plaintiffs claiming that it should have been calculated on the reduced rent. The difference having arisen the defendants referred it to the General Commissioners of the division, under the provisions of r. 22, sub.-r. 1 (*a*), of the All Schedules Rules of the Income Tax Act, 1918, the plaintiffs not appearing, and the Commissioners upheld the deduction as made by the defendants. In an action by the plaintiffs for the amount of the alleged over-deduction :—

Held, that the decision of the Commissioners was final and that the jurisdiction of the Court was ousted.

Action tried by Lawrence J.

The plaintiffs, the Ecclesiastical Commissioners for England, claimed from the defendants, Sackville Estates, Ld., ground rent on a lease of a building, office and business premises, of which the plaintiffs were the lessors. The original rent was 9500*l.* per annum. The assessment under Sch. A for the years 1933-1934, 1934-1935 on the defendants was 19,000*l.*, but on the ground that some of the rooms or parts of the building were empty during the years of assessment, relief was granted to them under s. 21 of the Finance Act, 1930 (20 & 21 Geo. 5, c. 28), so that the tax was collected on the sums of 3114*l.* and 5654*l.* only, for those two years respectively.

The defendants in paying their rent deducted the tax on the whole rent of 9500*l.* The plaintiffs, having discovered that the above-mentioned relief had been granted to the defendants, objected to the deduction. Thereupon the defendants, contending that a difference had arisen between themselves as tenants and their landlords, referred it to the General Commissioners under the provisions of r. 22 of the All Schedules Rules of the Income Tax Act, 1918. (1) The plaintiffs refused to acknowledge the jurisdiction of the Commissioners, and did not appear. The Commissioners held that the defendants were entitled to deduct the tax on 9500*l*. Thereupon the plaintiffs brought this action, claiming that the Commissioners had no jurisdiction in the matter. The defendants contended that the Commissioners had jurisdiction and that their decision was final and the jurisdiction of the Court ousted.

Latter K.C. and *F. Heyworth Talbot* for the defendants. This Court has no jurisdiction to try this case, because under r. 22 of the All Schedules Rules of the Income Tax Act, 1918 (1), that jurisdiction is conferred on the general commissioners whose determination, by sub-r. 2 (1) is final. Where a special statutory tribunal is appointed the jurisdiction of the High Court is ousted. *Allen* v. *Sharp* (2) per Parke B. during the argument; *Norwich Corporation* v. *Norwich Electric Tramways Co.* (3) The fact that the House of Lords has adjudicated in similar cases as if it had jurisdiction—e.g. in *Upperton* v. *Ridley* (4)—is not conclusive if, as in that case, the point was not taken: *Kydd* v. *Liverpool Watch Committee.* (5) Therefore, it is submitted, the case is free of authority against the contention of the defendants.

Under s. 9 of the Customs and Inland Revenue Act, 1874

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), General Rules Applicable to Schs. A, B, C, D and E. Rule 22: "(1) If a difference arises—(*a*) between landlord and tenant or any other persons with regard to the deduction on account of tax to be made from any annual sum . . . . the general commissioners of the division shall settle the proportion of the payments or deductions to be made according to the provisions of this Act, and, in default of payment, shall levy the same as if the proportions settled by them had been charged upon the respective persons, and shall pay over the same to the collector or to the proper person, as the case may require.

Sub-r. 2: In any such case the determination of the general commissioners shall be final."

(2) (1848) 2 Exch. 352, 360.

(3) [1906] 2 K. B. 119.

(4) [1903] A. C. 281.

(5) [1908] A. C. 327, 330.

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(37 Vict. c. 16), revenue cases first got into the High Court except claims for the recovery of penalties; before that all was left to the Inland Revenue Commissioners, so that there is nothing anomalous in the contention on behalf of the defendants.

[*Furtado* v. *City of London Brewery Co.* (1); *Rex* v. *Income Tax Commissioners for the City of London* (2); and *Rex* v. *Swansea Income Tax Commissioners* (3) were also referred to.]

This case belongs to the same class as *New River Co.* v. *Mather.* (4)

Cyril King K.C. and *F. N. Bucher* for the plaintiffs. This is a common law action for rent, which the tenants pay in rent and income tax. If they do not pay the full amount of the rent they can be sued in the common law courts. That has nothing to do with the Commissioners, and there is, therefore, jurisdiction in this Court to try the case. The Court will look jealously at any statutory provisions which are said to take away its jurisdiction. Unless clear words are used, the onus of showing that the plaintiffs' right of action has been taken away rests on the defendants: *Lowther* v. *Clifford* (5) per Lord Hanworth M.R.; and Scrutton L.J. said: (6) "I am entitled, in my view, to require a clear expression of an intention to deprive one of the King's subjects of his right to sue in the King's courts." In *Port of London Authority* v. *Commissioners of Inland Revenue* (7), which was a case stated by the Commissioners for the Special Purposes of the Income Tax, Scrutton L.J. said: "The appellants say they are dissatisfied with the amount of the assessment [to excess profits duty] made on them because it is calculated on the wrong principle . . . . and [that] they are therefore entitled to have the latter properly calculated. . . . . The respondents reply that the question which standard [profits or percentage] should be applied is a matter to be decided by the Inland Revenue Commissioners, the assessing authority, without appeal. If they are not satisfied, no appeal lies, however

(1) [1914] 1 K. B. 709.
(2) (1904) 91 L. T. 94.
(3) [1925] 2 K. B. 250.
(4) (1875) L. R. 10 C. P. 442.
(5) [1927] 1 K. B. 130, 139.
(6) Ibid. 147.
(7) [1920] 2 K. B. 612, 626.

wrong they may be in their calculations or in their construction of the Third Part of the Fourth Schedule. This contention of the respondents involves such startling consequences that I should be slow to accede to it unless compelled to do so by perfectly clear words. In the first place, the contention involves the result that a Government department, as an assessing authority, can fix the amount of tax to be recovered by a taxpayer without any appeal as to a vital part of the assessment. This is, in my experience, quite novel as a taxing principle, and contrary to the language of sub-s. 5 of s. 45." There are no such clear words in r. 22 of the All Schedules Rules as to oust the jurisdiction of the Court. It is so ousted only if, by that rule, the matter is left for the final decision of the Commissioners. The Commissioners under r. 22 are to " settle the proportion of the payments or deductions to be made according to the provisions of this Act." The Commissioners did not deal with that question at all, but only with the amount to be deducted. The Act itself determines the proper deduction.

[*Egyptian House Properties* v. *Maynards, Ld.* (1) was also referred to.]

Latter K.C. in reply. There is nothing extraordinary in the fact that the decision of the Commissioners should be final; for it was so under the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 160, and so continued indisputably for many years.

[*Allen* v. *Sharp* (2) was referred to.]

" Proportion " in r. 22 means " amount."

LAWRENCE J. In this case the plaintiffs, the Ecclesiastical Commissioners for England, are suing the defendants, the Sackville Estates, Ld., for rent upon a lease of a building granted by the plaintiffs to the defendants, at a ground rent of 9500*l.* The assessment under Sch. A was made for the years in question, namely, 1933-34 and 1934-35, upon the defendants, and the nett assessment was for a sum of 19,000*l.* But in consequence of some of the rooms, or parts of this building, being empty, relief was granted to the defendants under

(1) [1934] 1 Ch. 681, 689.

(2) 2 Exch. 352.

s. 21 of the Finance Act, 1930. That section provides that the Commissioners of Inland Revenue at any time not later than twelve months after the end of any year of assessment, if it is shown to their satisfaction that any apartment or tenement in any house or building let in different apartments or tenements and occupied by two or more persons was unoccupied during that year or any part of that year, shall cause such relief to be given from tax charged under Sch. A as appears to them just. Application having been made under that section of the Act of 1930, the Inland Revenue Commissioners granted relief to the defendants, so that the tax was calculated upon a sum of 3114*l.* for the year 1933-34, and upon a sum of 5654*l.* for the year 1934-35. The defendants sought to deduct the tax upon the whole 9500*l.*, which was the ground rent which was payable under their lease. The plaintiffs, the Ecclesiastical Commissioners, having discovered that relief had been granted under s. 21 of the Act of 1930, objected to such a deduction, whereupon the defendants purported to refer the difference which had arisen between them to the General Commissioners, under r. 22, sub-r. 1 (*a*), of the General Rules applicable to all Schedules of the Income Tax Act, 1918. The Ecclesiastical Commissioners protested against the jurisdiction of the general commissioners, refused to have anything to do with that purported reference, and brought this action for the rent.

Two questions have been argued before me, the first being whether the jurisdiction of the Commissioners, who have decided, under r. 22, that Sackville Estates, Ld., were entitled to deduct the amount of tax on 9500*l.*, is final and the jurisdiction of this Court ousted.

The second question which has been argued is whether, assuming that the jurisdiction of the Commissioners is not final and that the jurisdiction of the Court is not ousted, the decision of the Commissioners was right and whether Sackville Estates, Ld., have the right to deduct any more than the tax which they have actually paid and borne on 3114*l.* and 5654*l.*

The first question depends upon the construction of r. 22. The argument which has been presented for the plaintiffs by

Mr. Latter and Mr. Talbot is that r. 22 formed part of the Act of 1842 (s. 160), and that at that time there was no appeal from the decision of the general commissioners, and that therefore there is nothing extraordinary in committing this question to the final decision of the general commissioners, and that the words of the rule are apt to cover a difference such as this. On the other hand, Mr. King has argued that the words of r. 22 are not apt to cover the question as to what deduction a tenant is entitled to make from his rent on account of tax. The main argument adduced by him is that the words of the rule " the general commissioners of the division shall settle the proportion of the payments or deductions to be made according to the provisions of this Act, and, in default of payment, shall levy the same as if the proportions settled by them had been charged upon the respective persons, and shall pay over the same to the collector or to the proper person, as the case may require," are totally inappropriate to apply to determining what the proper deduction is. He says that the Act lays down rules to determine what the proper deduction is and that this rule merely gave to the Commissioners power to apportion or to settle the proportions of the payments or deductions so arrived at by reference to the Act. But he is constrained to admit that that construction of the words of r. 22 gives little or no meaning to the first subsection which says: " If a difference arises (*a*) between tenant and landlord or any other persons with regard to the deduction on account of tax to be made from any annual sum."

On the other hand, Mr. Latter says that the words may either be read as though the words " the proportion of the payments or deductions " are equivalent to the amount of the payments or deductions or that the words may be read " shall settle the proportion of the payments, or shall settle the deductions to be made according to the provisions of this Act." He also contends that the words " and, in default of payment, shall levy the same as if the proportions settled by them had been charged upon the respective persons, and shall pay over the same to the collector or to the proper person, as the case may require," are perfectly apt to deal with a case where an improper deduction has been made by the tenant and a difference has arisen as to the improper deduction, and it is necessary for the Commissioners to settle, as between the tenant and the landlord, what was the proper deduction, to put right that improper deduction and to levy the amount of the proportion upon the two of them, and to pay over either to the collector or to the landlord or tenant, as the case may be, the proper proportion.

I have, with considerable reluctance, come to the conclusion that r. 22 ought to be given the construction for which Mr. Latter contends, and on that view of the rule the jurisdiction of the Court, upon the question now raised, is ousted, and I have no jurisdiction to deal with the second question which has been argued. If the view which appears to have been taken by the Commissioners should be thought to work hardship, it is a matter which can be dealt with by legislation. I do not think it would be proper for me, holding that there is no jurisdiction, to express my own opinion upon it. I therefore must give judgment for the amount of the rent based upon the view of the General Commissioners as to the proper deduction to be made.

Solicitors for plaintiffs: *Milles, Jennings White & Foster.*

Solicitors for defendants: *Gregory, Rowcliffe & Co., for Addleshaw, Sons & Latham, Manchester.*

W. L. L. B.

ANGLO-SCOTTISH BEET SUGAR CORPORATION, LIMITED *v.* SPALDING URBAN DISTRICT COUNCIL.

1937
May 5, 6, 11.

[1936. A. No. 1946.]

Contract—Mistake as to existence of agreement—Whether mistake of fact or law—Company—Knowledge by one agent of fact unknown to another agent—Whether company entitled to rely on agent's mistake.

The plaintiff company, which had its head office at G. and had a district office at N., contracted with the defendants for the supply of water to their branch factory at S. The original contract, in 1925, provided for a minimum quarterly payment of 375*l.* by the plaintiffs. In 1927 a new contract was made, under which the quarterly payment was reduced to 100*l.* This contract was negotiated by the plaintiffs' managing director at G., and by mistake the factory manager at S. was not notified of the new contract, nor was the commercial manager at N. The defendants, also by mistake, continued to send out demands at the old rate of 375*l.*, which were passed for payment by the plaintiffs' branch manager at S. and forwarded to the commercial manager at N., who drew cheques which were signed as a mere matter of routine without further inquiry by the managing director on his next visit to N. The error was not discovered until 1936, when the plaintiff company sought to recover the amounts overpaid :—

Held, (1.) that the mistake was a mutual mistake of fact, not of law, and that the plaintiffs were prima facie entitled to recover.

Kelly v. *Solari* (1841) 9 M. & W. 54 and *Cooper* v. *Phibbs* (1867) L. R. 2 H. L. 149 applied.

(2.) That even if the principles on which a company is held liable for the fraud of an agent apply equally to cases of innocent mistake, the mistake of the factory manager and the commercial manager was the mistake of the plaintiff company, which could rely on it, and it was immaterial that the managing director of the company knew of the existence of the second contract, he not being aware that it was not being acted on.

Barwick v. *English Joint Stock Bank, Ld.* (1867) L. R. 2 Ex. 259; *S. Pearson & Son, Ld.* v. *Dublin Corporation* [1907] A. C. 351; and *London County Freehold and Leasehold Properties, Ld.* v. *Berkeley Property and Investment Co., Ld.* (1936) 155 L. T. 190 discussed and explained.

Action tried by Atkinson J.

The plaintiffs, the Anglo-Scottish Beet Sugar Corporation, Ld., were a company with their registered office at Glasgow, a district office at Nottingham, and a branch factory at Spalding. For the purposes of this factory the plaintiffs required a very large supply of water in one quarter of the

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year and a very much smaller supply in the other quarters. They made an agreement in 1925 with the defendants, the Spalding Urban District Council, for the supply of water, subject to payment by the plaintiffs of a minimum quarterly sum of 375*l.*, irrespective of the amount of water used in the quarter. By a supplemental agreement in 1927 the quarterly payment was reduced to 100*l.* This agreement was negotiated on behalf of the plaintiffs by their managing director in Glasgow and should have been notified to the managers at Nottingham and Spalding, but by an oversight that was not done. The defendants, also by a mistake in their office, continued to send quarterly demands for 375*l.* to the plaintiffs' Spalding factory, which the manager there, in ignorance of the new agreement, initialled as correct, and passed to Nottingham for payment. The commercial manager there drew cheques for 375*l.* which were signed without inquiry by the managing director on his next fortnightly visit. These payments went on till 1936, when a proposed amalgamation of the plaintiffs with another company led to the discovery of the mistake. The plaintiffs claimed to recover 4591*l.* 3*s.* 10*d.* overpaid from June 30, 1928, to September 30, 1935.

The defendants admitted the agreements, but said that if any overpayments were made they were made voluntarily and were irrecoverable, or were made under a mistake of law. They relied also on the Statute of Limitations so far as the earlier payments were concerned. A plea that the action was barred by the Public Authorities Protection Act, 1893, was not persisted in.

Richard O'Sullivan K.C. and *W. A. Sime* for the plaintiffs. If persons, knowing the facts, deliberately pay money, admittedly they cannot recover; but here the payment was due to ignorance of the existence of a supplementary agreement. [They referred to *Midland Ry. Co.* v. *Withington Local Board* (1); *Berg* v. *Sadler* (2); *Kelly* v. *Solari*. (3)] The latter

(1) (1883) 11 Q. B. D. 788.
(2) (1937) 53 Times L. R. 430.
(3) 9 M. & W. 54.

was approved in *Imperial Bank of Canada* v. *Bank of Hamilton* (1), and the principle was discussed by Lord Sumner in *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (2) The mistake here was a mutual mistake of fact, the mistake of the plaintiffs being induced by the mistake of the defendants.

In order to avoid the operation, as to part of the claim, of the Statute of Limitations, it is necessary to argue that the cause of action did not arise until, in May, 1936, the plaintiffs demanded the repayment from the defendants and were refused. Where a plaintiff has no knowledge of his cause of action at the time of payment, and only becomes aware of it at a specific date, he must not be guilty of laches thereafter.

As to the circumstances in which a demand for payment is necessary before the money can be recovered, see *Freeman* v. *Jeffries* (3), which was distinguished in *Baker* v. *Courage & Co.* (4)

[ATKINSON J. Here it was the Council's own fault that they did not know of the mistake. Therefore they cannot be heard to say that they ought to have had notice.]

Wallington K.C. and *Maurice FitzGerald* for the defendants. It is not disputed that the payments made were not in accordance with the supplementary agreement, but it is submitted that the mistake was one of law: see *Stanley Bros.* v. *Corporation of Nuneaton.* (5) It was, moreover, a voluntary payment in the sense that it was made with knowledge of the existence of that agreement. [They referred to *Rogers* v. *Ingham* (6); *Slater* v. *Mayor, &c., of Burnley* (7); *Wilding* v. *Sanderson.* (8)] The last-named case dealt with the position where the mistake of one party to a contract is induced by the other party. Here, although it may be said that the defendants were responsible for producing the mistake in the mind of the plaintiffs, yet the plaintiffs may equally be said to have produced the mistake in the mind of the defendants, because, if they had not paid the first mistaken demand, the

(1) [1903] A. C. 49.
(2) [1926] A. C. 670, 696.
(3) (1869) L. R. 4 Ex. 189.
(4) [1910] 1 K. B. 56.
(5) (1913) 108 L. T. 986.
(6) (1876) 3 Ch. D. 351, 356.
(7) (1888) 59 L. T. 636.
(8) [1897] 2 Ch. 534, 550.

defendants would not have continued to deliver mistaken demands. No greater responsibility, therefore, attaches to one party than to the other.

The plaintiff corporation, as a corporation, did not make these payments under a mistake of fact. To have a document and forget that it exists, and make payments which disregard it, is a mistake of law by the payor as to his legal rights: see *Holt* v. *Markham*. (1) If, because he has forgotten the existence of a document, reference to which would have prevented him from making a mistake, a party does not refer to it, that does not convert his mistake from one of law as to his rights into one of fact. Otherwise the door would be opened to a great deal of inconvenience and injustice. Even, therefore, if the corporation, as such, could be said to have forgotten the existence of the agreement, they would still be making a mistake of law. The knowledge of a corporation is the knowledge of its officials who act on its behalf, and in this case the corporation through its officials knew of the existence of this agreement. *London County Freehold and Leasehold Properties* v. *Berkeley Property and Investment Co.* (2) was a case of fraud where an innocent agent made on behalf of a company to a purchaser a representation which was known to be untrue by another agent who had given it to the first for the purpose of his passing it on to the purchaser. If a company can be fraudulent through an innocent agent, because the knowledge of another less innocent agent is imputed to it, then it has the knowledge of its agent, the general manager, as to the existence of an agreement, and it matters not that another agent has forgotten it. The act of the person who signed the cheques in the present case was the act of the corporation which knew of the agreement.

[ATKINSON J. Does not your argument practically mean that a company can never recover money paid by mistake?]

Whether it was the result of forgetfulness or want of knowledge, ignorance of the existence of the second agreement on the part of the plaintiffs, even if it was a mistake of fact in its origin, resulted in a mistake of law in that the plaintiffs, basing

(1) [1923] 1 K. B. 504.

(2) 155 L. T. 190.

themselves on the wrong document, believed themselves bound to pay a larger sum than they were actually bound to pay.

O'Sullivan K.C. in reply, referred to *Cooper* v. *Phibbs* (1); *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (2); and *Meadows* v. *Grand Junction Waterworks Co.* (3) The defendants admitted that the overpayment was made and made by mistake. That disposed of the defence of voluntary payment. What was the mistake of law? The common law said that money so paid ought to be returned.

Cur. adv. vult.

1937. May 11. ATKINSON J. In this case the Anglo-Scottish Beet Sugar Corporation, Ld., is claiming the return from the Spalding Urban District Council of money which it is alleged was paid by mistake. The plaintiff company has a number of factories scattered about the country. Its registered office is in Glasgow. Its commercial headquarters are in Nottingham. The factory with which this case is concerned is at Spalding. A Mr. Talbot-Crosbie is the managing director. His time is spent between Glasgow and London. Mr. Weisse was the general manager at Nottingham, but he became ill in 1928 and died in 1930. A Mr. Evans was the commercial manager at Nottingham. The local manager at Spalding was Mr. Gostick.

The company needed large supplies of water for its factories, and in 1925 entered into an agreement with the defendants for the supply of water. In the last quarter of the year large quantities of water are wanted, and in the other three quarters very little. The only relevant provision in that agreement was that water was to be paid for quarterly at certain prices but the amount to be paid by the plaintiffs "in respect of water supplied in any quarter shall not be less than 375*l*. whatever may be the quantity of water actually taken" during that quarter. The parties thought that was an excessive payment and two years afterwards, on December 7, 1927, a further

(1) L. R. 2 H. L. 149.
(2) [1926] A. C. 670.
(3) (1905) 69 J. P. 255.

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agreement was made modifying the first agreement to the extent that the minimum payment was reduced to 100*l.*

Normally the corporation's agreements are kept in Glasgow, but copies ought to be sent to Nottingham. Apparently no copy of this second agreement was ever sent to Nottingham, certainly none was sent to Spalding, and Mr. Evans, the commercial manager at Nottingham, never heard of it. I suppose that Mr. Weisse must have known of it, I do not know; but certainly Mr. Talbot-Crosbie, the managing director, knew of it because he negotiated it.

Notwithstanding this agreement the defendants continued to send in demand notes for a minimum charge of 375*l.* with only one or two exceptions. Except in the fourth quarter of the year the amount of water taken in any quarter never exceeded 100*l.* in value, but these notes came in alleging that a minimum charge of 375*l.* was due. No explanation whatever has been offered by the defendants for these inaccurate demands. The first was in July, 1928, and from July 1, 1928, right up to 1936 these demands were sent in and were paid. A statement of the sums paid and of the extent to which they were over-payments was agreed. When the accounts came in they were checked and passed by Mr. Gostick. I have the accounts before me and they all have a stamp in the corner showing that they had been checked and passed for payment. They were then sent to Nottingham because all payments were made from there. Mr. Evans has not been called and I do not know to what extent accounts were checked afresh. Probably they were not; the passing of the account by the manager at Spalding would most likely be treated as sufficient. At any rate the cheques were drawn there in accordance with the demands passed by Mr. Gostick, and every fortnight Mr. Talbot-Crosbie, the managing director, went to Nottingham for the purpose of signing cheques. He says that he would have before him anything from 600 to 800 cheques to sign, that he signed them without bringing his mind to bear in any way upon the accuracy or otherwise of the amounts for which the cheques were drawn and that he never had any idea in signing

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these cheques that he was signing cheques for payments which were not due. Last year there were certain negotiations for amalgamation, and during those negotiations this series of mistakes was discovered. The defendants have in fact received 4591*l.* 3*s.* 10*d.* to which they are not entitled. The various payments have been made by mistakes to which the defendants have certainly contributed by their inaccurate demands, and the plaintiffs claim the return of this money.

It is not suggested that there are any circumstances which would enable the defendants to pray in aid the principle of *Skyring* v. *Greenwood* (1), and at first sight, subject to the Statute of Limitations, it would seem a clear case. Mr. Gostick and Mr. Evans both thought their rights and obligations were regulated by the agreement of 1925 when in part that agreement had been superseded by the agreement of 1927, an agreement of which they had never heard. The signatures on the cheques were purely mechanical; the managing director naturally assumed that the accounts had been checked accurately and that they were in order.

The case relied upon by the plaintiffs is *Kelly* v. *Solari.* (2) There the executrix of a man named Solari had received payment from the Argus Life Assurance Company of money due, or alleged to be due, on three life policies. In fact one of those policies had lapsed before the death of the assured. The actuary of the office, who knew all about it, had informed two directors of the lapsing of the policy, and the policy had been marked "Lapsed." When the claim was made, although these two directors had been given this information, they had forgotten all about it and they passed the claim for payment, and signed the cheque in payment of the amounts due, or apparently due, on the policies. Then the mistake was discovered, the representatives of the assurance company claimed back the money paid on the policy which had lapsed, and they were held entitled to recover. Two passages have been frequently cited; one is a passage from the judgment of Parke B. (3): "I think that where money is paid to another

(1) (1825) 4 B. & C. 281.
(2) 9 M. & W. 54.
(3) 9 M. & W. 54, 58.

under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley J. in the case of *Milnes* v. *Duncan* (1); and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact." Rolfe B. said: "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it."

That case was considered by the House of Lords fairly recently in *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (2) I need not trouble with the facts of that case. I merely wish to point out that Lord Shaw says this: "It is important to note exactly the principle of cases of refund on account of mistake in fact, as that principle was authoritatively expounded by Parke B. in *Solari's* case (3)." Then the learned Lord cites, obviously with approval, the passage which I have

(1) (1827) 6 B. & C. 671.
(2) [1926] A. C. 670, 688.
(3) 9 M. & W. 54.

read. He then says (quoting with approval the language of Lord Lindley in *Imperial Bank of Canada* v. *Bank of Hamilton* (1)): "But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari* (2) that money honestly paid by a mistake in facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed." Again Lord Sumner refers (3) to *Kelly* v. *Solari* (2) as part of the foundation of his judgment, and Lord Carson quotes with approval both the passages I have read, the one from the judgment of Parke B. and the other from the judgment of Rolfe B.

I need not read it, but in *Barrow* v. *Isaacs & Son* (4) Kay L.J. laid down precisely the same principle emphasizing his view that negligence and carelessness did not deprive the plaintiff of his right to recover. The Lord Justice said: "although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant."

Therefore prima facie one would have thought that the plaintiffs have a very clear case. But two points were taken for the defence. First, it was said that the mistake was a mistake as to the plaintiffs' legal rights and obligations, that the plaintiffs thought their legal rights were different from what they in fact were, and therefore that the mistakes were mistakes of law. It is, of course, common ground that mistake of law does not entitle a person paying to recover money; and a mistake in the construction of a contract is treated as mistake of law and not as mistake of fact. The argument is that the plaintiffs' mistake was mistake of law, because they thought their legal rights were different from what they in fact were.

It seems to me that this argument begs the question. In most of the cases of payment by mistake the person paying has paid because of mistake as to his legal right or obligation, and whether the payment can be recovered or not depends

(1) [1903] A. C. 49, 56.
(2) 9 M. & W. 54.
(3) [1926] A. C. 670, 696, 698.
(4) [1891] 1 Q. B. 417, 425, 426.

upon whether that mistake as to legal right is due to a mistake of fact or a mistake of law. In *Kelly* v. *Solari* (1) obviously the payment was made under a mistake as to the extent of the company's legal obligation; it was a mistake as to the right of the executrix, a mistake as to the company's obligation. But that mistake of right was due to a mistake of fact, and therefore the money paid was recoverable.

Cooper v. *Phibbs* (2), I think, is in itself a complete answer to this argument. I only desire to read one passage from Lord Westbury's opinion. It was a very complicated case, and the question was who in fact was entitled to a certain fishery. Lord Westbury says this: "The result, therefore, is, that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a Court of equity with regard to the dealing with that agreement. It is said, 'Ignorantia juris haud excusat'; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

Another case referred to, *Meadows* v. *Grand Junction Waterworks Co.* (3), is a good example of mistake as to legal right being based upon a mistake of fact. In that case the plaintiff was seeking to recover an excessive payment of water rate. He did not know that his house was on the estate of the Bishop of London; apparently tenants on the estate of the Bishop of London paid smaller water rates than other people. He was ignorant of that fact and therefore ignorant of his legal rights, but he had no difficulty in recovering his payments. *Barber* v. *Brown* (1) is another case of a payment under a mistake of legal right due to a mistake of fact.

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(1) 9 M. & W. 54.
(2) L. R. 2 H. L. 149, 170.
(3) (1905) 69 J. P. 255.

Therefore I do not think the first argument assists the defendants in this case. But the second point is more formidable. Mr. Wallington argued that no payment can be recovered which is made with full knowledge of the facts, that the payment was the company's payment, that the knowledge of its servants and agents was the knowledge of the company, and that therefore the company cannot be heard to say that it made these payments in ignorance of any relevant fact. It is said, doubtless with truth, that the managing director and the secretary at any rate knew of the second agreement, and although they did not know that the cheques were not in accord with it, Mr. Gostick knew, and therefore the company voluntarily by Mr. Gostick made payments in accordance with the first agreement, the company knowing all the time by its managing director and secretary that the payments ought to have been in accordance with the second agreement.

That is how the argument is put, and it is based upon *London County Freehold and Leasehold Properties, Ld.* v. *Berkeley Property and Investment Co., Ld.* (2) That case was concerned with a fraudulent misrepresentation, and it is said that it established the proposition that if an agent makes a representation on behalf of his principal which is untrue in fact, but which he honestly believes to be true, the principal is guilty of fraud if the true facts are known to another agent although that other agent knows nothing of the representation, supplies no inaccurate information and in no way fails in his duty; in other words, that a principal may be held liable for a fraudulent misrepresentation although he and every agent have fallen short in no way of the highest standard

(1) (1856) 1 C. B. (N. S.) 121.

(2) 155 L. T. 190.

of honour and rectitude. In other words, it is said that two rights may make one wrong, and it is argued that if that proposition is well founded as to fraud a fortiori it applies to mistake. It is put in this way, the payment is the company's payment, the knowledge of all its agents is the company's knowledge and therefore the company has made these payments with full knowledge of all the relevant facts.

Before considering that case I want to consider what the law was before that case was decided. This only involves the consideration of two authorities, the first of which is *Barwick* v. *English Joint Stock Bank.* (1) There the plantiff had given certain credit on a representation made to him by the manager of one of the branches of the defendant bank. The customer to whom the plaintiff was going to give credit was in fact indebted to the bank to the extent of over 12,000*l.* The plaintiff knew nothing of that, but the manager did, and the plaintiff gave credit upon the manager giving a written guarantee to the effect that the customer's cheque on the bank in the plaintiff's favour in payment of certain oats supplied should be paid on receipt of certain money in priority to any other payment "except to this bank." It was held that that statement so far as the manager was concerned involved a fraudulent misstatement of fact, because it implied that there was nothing material owing to the bank and that the plaintiff would get paid, when in fact the 12,000*l.* owing to the bank far more than swallowed up any money which could possibly be coming to the account of the person who was getting goods delivered to him.

The point of law in that case was whether the defendants were liable for the fraudulent misrepresentation of their agent. It was thought at that time that two cases, *Cornfoot* v. *Fowke* (2) and *Udell* v. *Atherton* (3), threw some doubt upon the proposition that a principal was liable for the fraud of his agent; and all that *Barwick* v. *English Joint Stock Bank* (4) decided was that the principal was liable for the fraud of his agent in just the same way as he was liable for any other wrong committed by an agent. Willes J. said (1): "No sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye laws."

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(1) L. R. 2 Ex. 259.
(2) (1840) 6 M. & W. 358.
(3) (1861) 7 H. & N. 172.
(4) L. R. 2 Ex. 259, 265.

The other case to which I want to refer is *S. Pearson & Son, Ld.* v. *Dublin Corporation.* (2) There the defendants had invited the plaintiffs to tender for certain sewage works, and, for the purpose of enabling them to tender, plans with drawings and specifications were given to the plaintiffs by the defendants. These plans and drawings and specifications had been prepared by engineers employed by the corporation, and on these drawings or plans were certain statements as to the relevant circumstances of the works. In particular there was a statement as to the existence of a wall at a depth of 9 feet. The only relevance of that was that if the statement was true the cost of the work would be far less than if the statement were untrue. Relying on the truth of that statement the contractors had agreed to do the work at a certain sum. When they came to do the work they found that the statements were wholly untrue and they incurred therefore a very much greater expense. Thereupon they brought an action for fraud. It had been tried in Ireland and the Chief Baron had withdrawn the case from the jury for the reason that one of the conditions in the contract was that the contractor had to "satisfy himself as to the dimensions, levels and nature

(1) L. R. 2 Ex. 259, 265.

(2) [1907] A. C. 351.

of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works," and so on. The Chief Baron thought that that clause protected the corporation even from the fraud of its agent. He had been reversed by the King's Bench Division in Ireland and that Division in its turn had been reversed by the Court of Appeal and hence the appeal to the House of Lords.

It must be appreciated that the real point of the case was whether the corporation was protected by this clause. The jury had never, of course, in fact found that the engineers had been guilty of fraud; but Lord Halsbury in his opinion (1) read some of the evidence which had been given, particularly the cross-examination of one of the engineers from which it seemed fairly clear that the misstatement as to the existing wall and as to its depth had been made deliberately by all three engineers concerned with the object of influencing the cost of the work. Therefore, the position was that there was evidence that certain agents of the defendants had made dishonest representations which were handed on to the plaintiffs by an innocent principal, and then arose the question, was the condition which would by common consent not have protected the principal from the principal's own fraud, effective to protect him from the fraud of his agent; and it was held that the fraud of the agent must be deemed to be the fraud of the principal and that the clause was no protection.

There were two short quotations from that case relied upon in *London County Freehold and Leasehold Properties, Ld.* v. *Berkeley Property and Investment Co., Ld.* (2). Lord Loreburn said (3): " [These clauses] contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge." Lord Halsbury said the same thing: " It matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge."

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(1) [1907] A. C. 351, 357.
(2) 155 L. T. 190.
(3) [1907] A. C. 351, 354, 359.

It will be observed that in both those quotations the expression used is "guilty knowledge." Mere knowledge of facts can never in itself be guilty. The word "guilty" in relation to knowledge must have reference either to its mode of acquisition or to its use or non-use or to its disclosure or non-disclosure; and the knowledge referred to in the words which I have cited was clearly the knowledge that the statement was being made and was untrue. In that case the guilty knowledge was in the agent. We have therefore this position. *Barwick's* case (1) decided that the principal was responsible for the fraudulent representation of an agent made directly by the agent to the third party. *S. Pearson & Son, Ld.* v. *Dublin Corporation* (2) decided that a principal was liable for the fraudulent representations of his agent although those representations reached the third party through and by the innocent channel of the principal just as the principal would be liable if he, the principal, fraudulently caused an innocent agent to communicate a misrepresentation to the third party.

Bearing those decisions in mind I come to the case relied upon—*London County Freehold and Leasehold Properties, Ld.* v. *Berkeley Property and Investment Co., Ld.* (3) The facts in that case are quite simple. The defendants, who owned various blocks of flats, were negotiating the sale of four large blocks to the plaintiffs, who had been furnished with schedules of the names of the tenants, the terms of the leases and the various rents. They had in returning the draft contract asked the question: "Are all the tenants' rents paid punctually and without dispute?" Mr. Dixey was both the solicitor for and managing director of the defendant company. He

(1) L. R. 2 Ex. 259.
(2) [1907] A. C. 351.
(3) 155 L. T. 190.

had nothing personally to do with the conduct of this business, but his managing clerk, a Mr. De Rees, was acting for him. They had in their employment a Mr. Addis; he was manager of the department which collected the rents, and he would know better than any one else what the position was as to the payment of rents. Mr. De Rees answered the question in the words: "There are no disputes and the rents are paid promptly with very few immaterial exceptions." That statement was untrue: quite a number of the rents were paid irregularly and were very late, and that statement was treated as a misrepresentation of fact. Mr. De Rees' evidence was that he had gone to Mr. Addis and had asked him about these rents and that he had received that answer from Mr. Addis and that Mr. Addis had seen and approved the answer that he, Mr. De Rees, was intending to make. There was a little complication owing to the fact that Mr. Addis was ill at the time of the trial; his evidence had been taken on commission and all this had not been put to him; he had simply been asked, had Mr. Dixey come to see him and made any inquiry about these matters, and he said that Mr. Dixey had never been near him, which was perfectly true, but he never said anything about Mr. De Rees coming to him. The action was tried by Goddard J., who held that the claim for fraud failed, but he found for the plaintiffs on a breach of warranty. There was an appeal and a cross-appeal, and the decision of Goddard J. was reversed on both findings. The question is, What were the grounds upon which the company was held liable for fraud?

The judgment of Slesser L.J. begins for this purpose near the bottom of p. 192; the first part of the judgment deals with the warranty and then the Lord Justice deals with the facts relating to the misrepresentation and refers to the evidence of Mr. De Rees. That evidence was that Mr. Addis did approve the statements and knew all about them. Slesser L.J. then proceeds (1): "On these facts the case resolves itself into one where the agent who made the representation to the plaintiffs believed it to be true at the time he made it; that is the position of Mr. De Rees; but his informant, Mr. Addis, who was also an agent of the company, though he knew it to be untrue, did not make the representation to the plaintiffs, and the question arises in such a case: May the company in such circumstances be found liable in fraud when the elements of the fraud have to be collected from different agents of the company?" It is to be noticed there that Slesser L.J. is treating Mr. Addis as one who had been referred to, who had given the information and who knew the statement to be untrue. Then he referred to *Cornfoot* v. *Fowke* (1) and to *Barwick* v. *English Joint Stock Bank* (2), and finally to *S. Pearson & Son, Ld.* v. *Dublin Corporation* (3), and he quotes the words of Lord Loreburn: "The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge." The Lord Justice then goes on: "For myself, I cannot see why if the physical act of several agents may collectively be deemed in law to be the joint responsibility of a principal, the same principle should not apply to states of mind. The agent and principal are in law one for the purpose of the acts which make up the fraudulent misrepresentation; and equally the same considerations apply if, as here, both Mr. De Rees and Mr. Addis were servants of the same corporation and the ingredients of the fraud are all to be found in the acts of the agents of one principal. I think, therefore, that once it is held that Mr. Addis stated that which was untrue to his knowledge to Mr. De Rees, and Mr. De Rees, albeit innocently, used that untrue material information to induce the plaintiff company to act to their detriment, the company may be said to have been guilty of fraudulent misrepresentation, and it matters not that one element in that wrong is to be traced to Mr. Addis and another element to Mr. De Rees."

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(1) 155 L. T. 190, 193.

There is nothing whatever in that judgment to suggest the principle now contended for by Mr. Wallington. There is nothing there to suggest that Slesser L.J. would have held the defendants liable if the fact had been that Mr. Addis had not been communicated with in any way at all, and if he had not communicated any untrue information to Mr. De Rees. On the contrary, it seems to me to indicate that the fraud of Addis was essential for a judgment against the defendants. His knowledge could fairly and properly be described as guilty knowledge; he knew the statement was going to be made; he knew it was untrue and he knew it was untrue because of the wrong information which he had himself supplied. That is the basis of the judgment of Slesser L.J.

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(1) 6 M. & W. 358.
(2) L. R. 2 Ex. 259.
(3) [1907] A. C. 351, 354.

The real problem is created by the judgment of Romer L.J., and I frankly admit that that judgment has caused me the very greatest difficulty. Romer L.J. says (1): "But I have also come to the conclusion that the cross-appeal of the plaintiffs should be allowed, for I think that the representation made by Mr. De Rees was untrue to the knowledge of the defendant company. It is quite plain that Mr. De Rees made the representation in all innocence, but he made it as agent for and on behalf of his principals, the defendant company, and they knew that the representation was false. Being a corporation, they could, of course, have no actual knowledge at all, but they must be deemed to have had the knowledge of their agents who normally dealt with questions arising between them and their tenants, and the true facts of the case must have been known to one or more of those agents. Captain Dixey and Mr. Addis, for instance, must have known between them that the statement was untrue, and the fact, if fact it be, that they did not know that the representation was being made is, in my judgment, immaterial. I say 'if fact it be' because though Mr. De Rees has sworn that Mr. Addis saw his note that contained the representation, I do not think that Mr. Addis, who was examined on commission before the trial, had an opportunity of giving his recollection as to that matter. But even assuming that Mr. Addis did not see the note, the defendant company must be held to have made a fraudulent misrepresentation. There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue. But it has now been laid down by the House of Lords that in such a case the principal is as much liable as though he had himself made the representation knowing it to be untrue: *S. Pearson & Son, Ld.* v. *Dublin Corporation.* (1) In that case it was said by Lord Loreburn that 'the principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.'"

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(1) 155 L. T. 190, 195.

Mr. Wallington says that that means that if Mr. De Rees made the representation innocently, none the less the representation was fraudulent on the part of the company, as the true facts were in the knowledge of Mr. Addis—fraudulent even though Mr. Addis had never been consulted and knew nothing of the question being asked and how it was being answered. It might very well be on such facts that Mr. De Rees might be held to have made the statement recklessly and without belief in its truth. But Mr. Wallington says that, apart altogether from that aspect of the case, the Lord Justice was laying it down that the mere knowledge of a perfectly innocent agent perhaps in another town, perhaps in another country, knowing nothing of the business in hand, makes the innocent representation fraudulent on the part of the company.

I cannot persuade myself that Romer L.J. meant to lay down so broad a principle as that. After all, everything a judge says has to be construed with reference to the facts of the case before him. I cannot myself see how a principal can be held liable for fraud when there has been no element of fraud either on the part of himself or on the part of any one for whose acts he is responsible. No such proposition had been argued or suggested in argument. Mr. Norman Birkett's argument was based upon the submission that " the statement about which he complained was untrue on the facts and the answer given ought not to have been made. The statement was false to the knowledge of the defendant company because it was false to the knowledge of Mr. Addis." Then again, many times in this judgment from which I have read, Romer L.J. refers to the knowledge that the statement was untrue; he refers to the company in one place and in another to Mr. Dixey or Mr. Addis knowing that the statement was untrue. One cannot know that a representation is untrue unless one knows of the representation and knows that it is to be made or is being made. Take for example the passage most strongly relied upon in Romer L.J.'s judgment (1): " There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue." What is the meaning of the last line? Can one know that a representation is untrue if one has no knowledge of its existence? I think the words relied upon which I have just read meant this, " when the principal, though having no personal knowledge that the representation is made, yet knows through another agent that it is being made and is untrue."

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(1) [1907] A. C. 351, 354.

I am confirmed in that belief by what follows. Romer L.J. relies upon the case of *S. Pearson & Son, Ld.* v. *Dublin Corporation* (2), and cites the passage which I have read which contains the words " guilty knowledge." That case was no authority at all for the passage which I have read from Romer L.J.'s judgment if it be read in the sense in which Mr. Wallington would have me read it. Surely one cannot treat these words, " the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge " as authority for the proposition that " the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the *innocent* knowledge." Some importance must be attached to the word " guilty " and no one can construe the word " guilty "

(1) 155 L. T. 195.

(2) [1907] A. C. 351.

as meaning the same thing as "innocent." On the other hand the case referred to, *S. Pearson & Son, Ld.* v. *Dublin Corporation* (1), is a precise authority for the passage from Romer L.J.'s judgment in the sense in which I read it. Eve J. based his judgment upon the fact that Addis knew that the representations were untrue. Eve J. said (2): "I agree with the view of my brother Romer that Captain Dixey and Mr. Addis must have known that the representations were untrue." In my opinion all that was decided in the case was that a principal is liable for fraud where the fraudulent information supplied by one agent is handed on to a third party by an innocent agent.

I am not satisfied that a company can be saddled with fraud unless some agent has guilty knowledge with reference to the representation complained of; and therefore even if the principles applicable to fraud apply to mistake (and I am far from laying it down as a matter of law that they do) there is nothing to prevent me giving relief in this case and holding that the mistake of the agent was the mistake of the principal.

I might pause here to ask what would be the effect of Mr. Wallington's argument on the position of the defendants, because if his argument is right the defendants were putting forward demands which they knew were ill-founded. In my opinion the mere fact that some agent of the company knew of the second agreement is immaterial so long as he had no idea that it was not being acted upon. I think this case is well within the principle of *Kelly* v. *Solari* (3), and certainly the point relied on here was not raised there although obviously some servants of the company knew all about the lapsing of the policy.

The only other matter with which I have to deal is the Statute of Limitations. Normally I have no doubt that time runs from the date of payment, and I think the only exception is where there would be no cause of action until notice of the mistake has been given to the payee and demand made. The

(1) [1907] A. C. 351.

(2) 155 L. T. 190, 195.

(3) 9 M. & W. 54.

case relied on by Mr. O'Sullivan was *Freeman* v. *Jeffries*. (1) The headnote in that case is this: "By agreement between the outgoing tenant of a farm (the defendant) and the incoming tenant (the plaintiff), the amount to be paid by the plaintiff to the defendant was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting 2000*l*. paid on account) was given by the plaintiff to the defendant; and the plaintiff entered into possession." Later on he found that this valuation had included matters for which he was under no obligation to pay; but he paid the promissory note at maturity without objection, and subsequently brought this action to recover the amount overpaid. He made no demand, and the defendant at no relevant time had any information as to the valuation having included matters which it ought not to have included. But the relevancy of the case was in something which was said by Martin B., Bramwell B., and Pigott B. Martin B. said (2): "It is clear this action is not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which has been paid was paid under such circumstances as render a part or the whole recoverable back. I think this is clear, and I am prepared to give judgment on this point alone," and he then dealt with other matters. Bramwell B. in effect said the same thing (2): "But if the plaintiff were under the circumstances entitled to be repaid the sum he claims, he ought to have given notice to the defendant of the facts by reason of which he was so entitled; because until he did so there could be no duty on the defendant to pay it over." Pigott B. said (2): "I am much struck with the observations which my learned Brothers have made as to the necessity of a demand to entitle the plaintiff to maintain the action, and I am disposed to acquiesce in their view; but I prefer to rest my judgment" on other matters.

That case was considered by Hamilton J. (as he then was) in the case of *Baker* v. *Courage & Co.* (3). There the question arose as to when the cause of action—money paid by mistake—had arisen; and he said that it did not appear in the circumstances of that case "that notice of the mistake was necessary to raise a duty in Mr. Baker to pay the overpayment back. It was money had and received to the use of the defendants because it was money for which there was no consideration. Reliance was indeed placed by the defendants upon a case of *Freeman* v. *Jeffries* (1), the decision in which would bind me if the facts were the same, for both Martin and Bramwell BB. held that the action there, which was an action for money paid by mistake, was not maintainable without previous demand. But in that case at the time the first instalment of the money was paid neither the plaintiff nor the defendant made any mistake. The mistake was made by the two valuers who were subsequently employed to value the farm which was the subject-matter of the sale. It was not until the plaintiff afterwards consulted a third valuer on his negotiating for the resale of the property that he discovered that the former valuers had included in their valuation certain items which they ought not to have included, and after this he paid over the balance of the money to the defendant at a time when he knew of the valuers' mistake but the defendant did not. It was under those circumstances that Martin and Bramwell BB. held that there was no duty on the defendant to repay the excess valuation until after notice of the mistake, which was not his mistake and of which he was unaware. I think it is clear that they so decided without reference to a case in which not only the party paying paid under a mistake, but also the party receiving the money was under a mistake at the time when he received it. In my opinion, therefore, the case of *Freeman* v. *Jeffries* (2) does not support the contention of the defendants. But then it was said that this principle of the necessity of notice and demand as a condition of the completion of the cause of action is of general application and applies to all cases in which the defendant is required to return something which has come innocently into his possession but which he is not entitled to keep." Hamilton J.

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(1) L. R. 4 Ex. 189, 198, 200.

(2) Ibid. 189, 199, 200, 201.

(3) [1910] 1 K. B. 56, 65.

(1) L. R. 4 Ex. 189, 201.

(2) Ibid. 189.

there gave effect to his opinion that no notice was necessary to constitute the cause of action and that, except in cases within the principle of *Freeman* v. *Jeffries* (1), time ran from the payment.

I think the same view was indicated in *In re Mason* (2) by Romer J.

The position, therefore, is that from the sum claimed must be deducted the sum of 1925*l.* I think the amount that can be recovered is 2666*l.* 3*s.* 10*d.*, and I think that the plaintiffs are entitled to interest at 5 per cent. on each payment from the date of payment until judgment.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Savery, Stevens & Nutt, for R. A. Young, Nottingham.*

Solicitors for defendants: *Smith, Rundell, Dods & Bockett, for Raymond W. Hastings, Spalding.*

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(1) L. R. 4 Ex. 189.

(2) [1928] Ch. 385, 392.

J. W. H

LLOYDS BANK, LIMITED *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

1937
May 25, 26
June 8.

Principal and agent—Mercantile agent—Pledge of documents—Surrender by pledgees to pledgors as trustees for sale—Unauthorized pledge of documents by pledgors to third parties—" Owner "—Whether pledgors mercantile agents of pledgees—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.

The plaintiffs, who had advanced money to S. & Co. on the security of documents relating to merchandise, surrendered the documents to S. & Co. to enable them to sell the merchandise as trustees for the plaintiffs, a course of business which had been adopted by the parties for some years. S. & Co., unknown to the plaintiffs, pledged the documents with the defendants who acted in good faith and without knowing that the transaction was not in order. The plaintiffs having sued the defendants for the return of the documents or damages for their detention or conversion:—

Held, that the plaintiffs' claim failed, since they were owners of the goods represented by the documents within s. 2, sub-s. 1, of the Factors Act, 1889, as being in a position to give instructions for, and assent to, a sale of the goods and the persons to whom, or in trust for whom, the proceeds of the sale were payable, and S. & Co. were their mercantile agents within the sub-section in possession of the documents with their consent, so that the pledge of the documents by S. & Co. to the defendants in the ordinary course of their business was as valid as if S. & Co. had been expressly authorized by the plaintiffs to make the same.

ACTION tried by Porter J.

In December, 1934, and January, 1935, the plaintiffs, Lloyds Bank, Ld., advanced money and/or gave banking accommodation to a company named Strauss & Co., Ld., which carried on business in London and Bombay, against or by negotiating and/or by purchasing bills of exchange or documents in the form thereof drawn on behalf of Messrs. Strauss in Bombay on Messrs. Strauss in London. The plaintiffs received by way of security for such banking accommodation bills of lading and invoices in respect of certain merchandise on the terms set out in a letter of hypothecation dated May 21, 1930, and two agreements dated August 31, 1933, and

December 14, 1934. According to those documents, the plaintiffs were to be at liberty, in the event of any default by Messrs. Strauss, to sell or cause to be sold any of the merchandise concerned, and to apply the nett proceeds towards payment of the bill or bills, without prejudice to their right of recourse thereon against Messrs. Strauss for any deficit.

In pursuance of these agreements and the letter of hypothecation, the plaintiffs made advances and/or gave banking accommodation and facilities to Messrs. Strauss to the extent of 57,500*l.* against and/or by negotiation and/or by purchase from Messrs. Strauss in Bombay of bills of exchange or documents in the form thereof drawn as specified in the agreements on three dates in December, 1934. The plaintiffs, by way of security for the money advanced and/or banking accommodation and facilities given to Messrs. Strauss and/or for payment of the bills of exchange, received from Messrs. Strauss bills of lading and invoices relating to merchandise.

In January, 1935, the plaintiffs handed to Messrs. Strauss in London the bills of lading and invoices in question to enable Messrs. Strauss to sell the merchandise as trustees for the plaintiffs. The documents were handed to Messrs. Strauss on the terms of two letters, dated January 2 and 14, 1935, both of which were in the following terms :—

"Trust Receipt.

"To Lloyds Bank, Ld.

"Dear Sirs,—We hereby acknowledge the receipt of the undermentioned documents under lien to you and undertake to and declare that we act as your trustees for the landing, storage and sale of the relative merchandise. We also undertake that the said merchandise will be stored in approved warehouses separate from any other goods, whether belonging to ourselves or other persons.

"We also undertake that the proceeds of the sale of the said merchandise or any portion thereof will be received by us as your trustees and kept separate from other monies and will be remitted to you as and when received by us.

"We also undertake to keep the said merchandise fully insured, the relative policy or policies of insurance being held, and the proceeds thereof, or of any other insurance of the said merchandise, being received by us, as your trustees, and remitted to you as and when received.

" We further undertake to return to you on demand the balance of the said merchandise in respect of which you may not have received proceeds.

" Yours faithfully,
" For and on behalf of
" Strauss & Co., Ld.,
" E. H. Lessing,
" Director."

This practice by the plaintiffs of surrendering documents to Messrs. Strauss against trust receipts had been in existence since June, 1928.

Subsequently to January 14, 1935, Messrs. Strauss, who were in financial difficulties, unknown to the plaintiffs pledged with the defendants, the Bank of America National Trust and Savings Association, the documents referred to in the trust receipts. The defendants neither knew nor had any ground for suspecting that the transactions were not in order in every respect. On January 29, 1935, the Official Receiver was appointed provisional liquidator ot Strauss & Co., Ld., and the various creditors of the company were left to realize such security as they had. In November, 1935, the plaintiffs, by their solicitors, claimed from the defendants the value of the merchandise and an account, but the defendants refused to accede to that claim. The plaintiffs, accordingly, brought this action, claiming the return of the documents, or their value, or damages for their detention or conversion.

The defendants, while not admitting that Messrs. Strauss had deposited with them any of the documents referred to wrongfully or in breach of any duty to the plaintiffs and denying the conversion or wrongful detention of the documents, pleaded that they had received the documents as security by way of pledge for money advanced by them to Messrs. Strauss who were the owners of the documents. Alternatively, they said that Messrs. Strauss were the mercantile agents of the

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plaintiffs within the meaning of the Factors Act, 1889 (1), and were in possession of the documents with the consent of the plaintiffs as owners, and, in pledging the documents, were acting in the ordinary course of business, the defendants acting in the matter in good faith and without notice. Further, they said that the plaintiffs were estopped from alleging that the delivery to them (the defendants) of the documents by Messrs. Strauss was without the plaintiffs' authority.

Sir William Jowitt K.C., *Sir Walter Monckton K.C.* and *James Wylie* for the plaintiffs. The plaintiffs are entitled to succeed. The fact that a pledgee returns to the pledgor the subject-matter of the pledge so that the pledgor may deal with it in a specified manner does not deprive the pledgee of his rights under his contract of pledge so as to release the pledge: *Official Assignee of Madras* v. *Mercantile Bank of India.* (2) A pledgee may re-deliver the goods to the pledgor for a limited purpose without thereby losing his rights: *North-Western Bank* v. *Poynter, Son, & Macdonalds* (3); *Sewell* v. *Burdick.* (4) In the present case the plaintiffs' rights as pledgees remained unaffected by their adopting what has been described as a common and convenient mode of realization of the goods: *In re David Allester, Ld.* (5)

Strauss & Co. were not mercantile agents of the plaintiffs within s. 2, sub-s. 1, of the Factors Act, 1889, nor were the plaintiffs owners of the goods within that section, and,

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(1) By s. 1, sub-s. 1, of the Factors Act, 1889: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

By s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall . . . . be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

(2) [1935] A. C. 53.

(3) [1895] A. C. 56.

(4) (1884) 10 App. Cas. 74.

(5) [1922] 2 Ch. 211, 216.

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therefore, the plaintiffs must not be taken to have authorized Strauss & Co. to pledge the documents to the defendants. "Owner" within s. 2, sub-s. 1, means the person who possesses a present right to sell or otherwise deal with the goods, whereas the plaintiffs had only a limited and contingent control over the goods. The present right to sell the goods rested in Strauss & Co., who were the owners of the goods, for ownership is not lost by the creation of a security on the thing owned; per Lord Mersey in *The Odessa* (1); nor was their position affected by the fact that they could only sell as trustees for the plaintiffs. Sect. 2, sub-s. 1, of the Factors Act, 1889, clearly contemplates the mercantile agent and the owner of the goods as two distinct persons, so, if Strauss & Co. were the owners of the goods, they could not also be the agents of the plaintiffs. Moreover, "agent" denotes a person who deals with a subject-matter in consideration of commission paid to him by the principal and Strauss & Co. were to receive no commission from the plaintiffs on the sale of the goods: *Lowther* v. *Harris.* (2) Strauss & Co. were entrusted with the documents solely to enable them to sell the goods as trustees for the plaintiffs and no authority to pledge them can be implied therefrom. In those circumstances the defendants cannot avail themselves of the protection afforded by the Factors Act, 1889, nor of their plea of estoppel: *Pickering* v. *Busk* (3); *Monk* v. *Whittenbury* (4); *Cole* v. *North-Western Bank* (5); and see *Heap* v. *Motorists' Advisory Agency, Ld.* (6), in which *Folkes* v. *King* (7) was distinguished.

Babcock v. *Lawson* (8) is distinguishable because there the pledgees had parted with their special property in the goods. In the present case, as in *Nyberg* v. *Handelaar* (9), the plaintiffs retained their special property in the goods and are entitled to recover from the defendants: see also *Reeves* v. *Capper.*(10) The wrongful act of Strauss & Co. cannot deprive the plaintiffs of their rights as pledgees: *Bristol & West of England Bank* v.

(1) [1916] 1 A. C. 145, 154.
(2) [1927] 1 K. B. 393, 398.
(3) (1812) 15 East 38.
(4) (1831) 2 B. & Ad. 484.
(5) (1875) L. R. 10 C. P. 354.
(6) [1923] 1 K. B. 577.
(7) [1923] 1 K. B. 282.
(8) (1880) 5 Q. B. D. 284.
(9) [1892] 2 Q. B. 202.
(10) (1838) 5 Bing. N. C. 136.

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Midland Ry. Co. (1) It conferred on Strauss & Co. no new title to the goods: *Pease* v. *Gloahec.* (2) The position is rather that in *Staffs Motor Guarantee, Ld.* v. *British Wagon Co., Ld.* (3), where the persons entrusted with the property were held to be trustees and not mercantile agents.

Hon. Sir Stafford Cripps K.C. and *H. G. Robertson* for the defendants. The trust receipts clearly authorized Strauss & Co. to sell the goods, not as owners or principals, but as agents of the plaintiffs. Strauss & Co. were mercantile agents within s. 1, sub-s. 1, of the Factors Act, 1889, since they had " in the customary course of their business as such agent authority . . . . to sell the goods." They also came within s. 2, sub-s. 1, of the Act, because, as mercantile agents, they were, with the consent of the owners of the goods in possession of documents of title to the goods. Acting in the ordinary course of their business, they made a pledge of the goods and the disposition must be taken to be " as valid as if they (i.e., Strauss & Co.) had been expressly authorized by the owners of the goods to make the same." The effect of the plaintiffs' releasing the documents to Strauss & Co. made the latter mercantile agents within the meaning of the section. Strauss & Co. acted in the transaction as a mercantile agent would act and it should, therefore, be validated: per Lord Alverstone C.J. in *Oppenheimer* v. *Attenborough & Son.* (4)

The plaintiffs must be taken to be the owners of the goods within s. 2, sub-s. 1, of the Act, because they had full control of the goods. The contention that Strauss & Co., and not the plaintiffs, were the owners cannot avail the plaintiffs, since, if the plaintiffs were not the owners, they could not maintain their present claim for conversion, while, if Strauss & Co. were the owners, they had a full right to pledge the goods.

Apart from the Factors Act, 1889, the plaintiffs gave Strauss & Co. apparent authority to deal with the goods and they are, therefore, precluded, as against the defendants, who were induced bona fide to act on the faith of that apparent authority, from denying that they gave Strauss & Co. such an authority: per Blackburn J. in *Cole* v. *North-Western Bank* (1); *Fuller* v. *Glyn, Mills, Currie & Co.* (2)

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(1) [1891] 2 Q. B. 653.

(2) (1866) L. R. 1 P. C. 219.

(3) [1934] 2 K. B. 305.

(4) [1908] 1 K. B. 221, 226.

Sir William Jowitt K.C. replied.

Cur. adv. vult.

1937. June 8. PORTER J. read a judgment in which he stated the facts and continued: In these circumstances the plaintiffs claim the documents and goods or damages for their detention or conversion by the defendants.

Prima facie their claim is valid. They never gave up possession of their pledges except for a temporal or specific purpose and Messrs. Strauss never held the goods except as trustees to sell and hand the proceeds to the plaintiffs. The defendants, however, plead (1.) that Messrs. Strauss were at the time of the pledge of the documents with them (*a*) owners of the goods; (*b*) if not owners, then mercantile agents within the meaning of the Factors Act, 1889, and, therefore, entitled to give a valid title by way of pledge; and (*c*) that in any case the plaintiffs are estopped from alleging that the bills of lading were handed over without their authority.

It is common ground that Messrs. Strauss were owners in the sense that the general property in the goods or documents representing the goods was in them, but the plaintiffs say that this ownership was subject to their special interest in the goods by way of pledge, and that Messrs. Strauss were entrusted with the goods subject to that pledge, and could only deal with them subject thereto, unless they followed the express mandate given by the trust receipts, that is to say, by selling them. There would, however, be, they agreed, a right to pledge if Messrs. Strauss were mercantile agents entrusted with the goods by an owner under the provisions of the Factors Act, 1889, but they denied that that Act applied.

I agree that the substantial question which I have to determine is whether the Factors Act, 1889, applies or not.

At common law a person in the possession of goods can give no better title than he himself possesses, subject to the qualification that, if the true owners hold him out or permit him to hold himself out as having authority to do a particular act, they are estopped from denying that that authority exists. In the present case, although the plaintiffs gave Messrs. Strauss express authority to sell, they gave no authority, express or implied, to pledge, because no such authority can be implied from the mere possession of the goods: see *Pickering* v. *Busk* (1) and *Cole* v. *North-Western Bank.* (2) For this reason, in my view, the defendants' plea in estoppel must fail.

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(1) L. R. 10 C. P. 354, 363.

(2) [1914] 2 K. B. 168.

The rule that authority to sell gives no authority to pledge, though firmly established, has been the subject of considerable criticism, and one of the objects of the Factors Act, 1889, was to enable a mercantile agent entrusted with goods to give a good title by way of sale or pledge, notwithstanding that he had in fact no authority to do the act which he purported to perform. Those acts made the entrusting of the goods to the mercantile agent a kind of statutory holding out by the owner of the goods of authority in the agent to deal with them as if he were the owner.

The Factors Act, 1889, requires an owner, a mercantile agent, possession of the goods or documents of title by the agent with the owner's consent, and complete good faith in the purchaser or pledgee. Possession by Messrs. Strauss with the plaintiffs' consent and complete good faith are admitted. The plaintiffs, however, deny that they were " owners " and that Strauss & Co. were mercantile agents.

The word " owner " is not defined and one has to gather its meaning from the tenor of the Act and extraneously. In a sense it is true to say that Strauss & Co. were owners, because they had, at any rate, the general property in the goods or documents, but, nevertheless, the plaintiffs may be owners within the meaning of the Act. They had, at any rate, the possession and could permit or prevent the immediate delivery to a third person or delivery at all, unless their pledge were satisfied. The Act is, I think, meant to facilitate the giving of a good title by a mercantile agent, and it would

(1) 15 East 38.

(2) L. R. 10 C. P. 354.

be unfortunate if the validity of that title depended on whether the pledgee handed back the goods to the pledgor to sell or with his consent employed some third person.

This view, however, is not without its difficulties. Suppose that at a time when the pledgee is in possession of his pledge, but has as yet no power of sale (as, for example, he can only sell after default), is he then the owner so as to enable a mercantile agent to sell on his instructions and give a valid title ? I cannot think that he is, but I think that he is an owner within the meaning of that word as used in the Factors Act, 1889, provided that, in giving his instructions for sale, he has the assent of the person in whom the general property is vested.

I should be inclined to define " owner " as the person to whom or in trust for whom the proceeds of sale are payable, provided he is in a position to give instructions for or assent to a sale.

It was argued on behalf of the plaintiffs that Messrs. Strauss and not the plaintiffs were the owners. The difficulty of this view appears to lie in the fact that, under the trust receipts, whatever right Messrs. Strauss might have to an account and ultimate payment in case of a surplus of receipts over their indebtedness to the plaintiffs, yet the immediate sale and payment was to be for the plaintiffs' sole benefit.

If, then, the plaintiffs were owners within the meaning of the Factors Act, 1889, were Messrs. Strauss mercantile agents ? I agree with Sir Stafford Cripps that, if they were agents, they were mercantile agents. They were, if agents, agents employed to sell. The real question under this heading is : Were they agents at all ?

Looking at their mandate, namely, the trust receipts, I think that they were employed as agents, their duty being to sell on behalf of the plaintiffs and to receive and keep the proceeds on their behalf. If, as I think, Messrs. Strauss were acting as the plaintiffs' agents in the individual matters in dispute, it does not, in my view, matter that they were not agents for sale generally, either of grain or any other commodity. In fact, Messrs. Strauss had been selling for the plaintiffs under trust receipts for some six or seven years. An attempt which was made to prove that they had acted as mercantile agents for others in barley and one other commodity broke down, but this failure is, in my view, immaterial: see *Lowther* v. *Harris.* (1) They must, it is true, be acting as agents and not be entrusted with the goods in some other capacity: see *Monk* v. *Whittenbury* (2) and *Cole* v. *North-Western Bank* (3); but no other capacity than that of owners has been suggested, and that capacity I have already rejected.

My view that the plaintiffs were owners and Strauss & Co. mercantile agents in these transactions is, I think, generally supported by *North Western Bank* v. *John Poynter, Son, & Macdonalds* (4); *In re David Allester, Ld.* (5); and *Official Assignee of Madras* v. *Mercantile Bank of India* (6), although differences in detail between the present case and those cases undoubtedly exist.

In the course of his evidence on behalf of the plaintiffs, Mr. Robinson stated that, acting on their behalf, he intended to entrust the documents to Messrs. Strauss as owners. The instructions are contained in writing and must be construed by their terms, but in any case I doubt whether Mr. Robinson had sufficiently analysed the position. No doubt he entrusted the documents to Messrs. Strauss because they were owners. So did the pledgees in *North Western Bank* v. *John Poynter, Son, & Macdonalds* (4), *In re David Allester, Ld.* (5) and *Official Assignee of Madras* v. *Mercantile Bank of India* (6); but nevertheless the Factors Act, 1889, prevailed. The confusion, in my view, lies between handing the documents back to Messrs. Strauss to deal with them in their capacity of owners and handing them back to deal with them in their capacity of agents, because they were owners. I think that the latter was the course adopted by the plaintiffs, but, if I thought that they had adopted the former, I should be inclined to think that they had given up the security of their pledge.

(1) [1927] 1 K. B. 393.
(2) 2 B. & Ad. 484.
(3) L. R. 10 C. P. 354.
(4) [1895] A. C. 56.
(5) [1922] 2 Ch. 211.
(6) [1935] A. C. 53.

I have already said that in my view the point as to estoppel fails, but, for the reasons given above, I think the claim fails also. Having regard to this decision, the question whether any distinction should be drawn between the goods returned to Messrs. Strauss and those retained by the defendants does not arise. I find for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs : *Allen & Overy.*
Solicitors for defendants : *Slaughter & May.*

G. F. L. B.

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March 9, 10, 22.

RITZ CLEANERS, LIMITED *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE.

Rating—Derating—Hereditament—Cleaning and dyeing factory—Shop entrance—Vanmen to carry articles—Members of public directly dealt with—Industrial hereditament or retail shop—Primary user—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-ss.* 1, 4.

A firm of cleaners and dyers were in occupation under a lease for years of a hereditament situated in a busy shopping street in a London suburb. The hereditament, which had the external appearance of a shop, consisted of three floors, there being five rooms on the ground floor, two on the first floor, and two on the second floor. One of the rooms on the ground floor was entered from the street and had a counter for receiving and despatching goods; another room on that floor which faced the street and had a plate-glass window contained a plant for cleaning and drying articles; all the other rooms on the ground and first floors were used for purposes connected with the work of cleaning and dyeing, and the rooms on the second floor were unused. The firm dealt direct with members of the public and did not work for any other firm. Articles received for cleaning were brought to the hereditament by customers and by the firm's vanmen, who collected from two receiving offices maintained by the firm, and from an agency, and from customers' houses in response to orders received by post or telephone. Not more than one-third of the articles received at the hereditament was brought there by the customers themselves. Most of the articles brought by the customers to the hereditament were, after cleaning, delivered to the customers by the firm's vanmen:—

Held, by the Court of Appeal, that the proper legal inference from these facts was that the hereditament as a whole was primarily occupied and used for the purposes of a "retail shop" as defined by the Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 4; and, accordingly, that it was a retail shop and therefore not an industrial hereditament within the meaning of sub-s. 1 of that section, and was not derateable.

Finn v. *Kerslake* [1931] A. C. 457, 485 followed.

Toogood & Sons v. *Green* [1932] A. C. 663 discussed and explained.

The question whether or not upon the ascertained facts the purposes for which a hereditament is used and occupied are those of a "retail shop," as defined for the purposes of the Rating and Valuation (Apportionment) Act, 1928, by s. 3, sub-s. 4, thereof, is a question of law and not of fact.

Farmer v. *Cotton's Trustees* [1915] A. C. 922, 938, observations of Lord Parker applied.

APPEAL from the decision of a Divisional Court, on a case stated by the Rating Appeals Committee of the Middlesex quarter sessions under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

The facts proved or admitted were set out in para. 8 of the special case, and were substantially as follows :—

The respondents, Ritz Cleaners, Ld., were cleaners and dyers, and they had entered into occupation of the hereditament situate at No. 48 High Street, Uxbridge, on July 14, 1934, under a lease for twenty-one years from March 25, 1934, at a yearly rental of 215*l*. The hereditament in question was situated in a busy shopping street in Uxbridge and had the external appearance of a shop. It was described in the valuation list for the Uxbridge Urban District Rating Area as "shop and premises." The hereditament consisted of three floors. On the ground floor there were five rooms : (*a*) a room entered from the street with a counter for receiving and despatching goods ; (*b*) a room facing the street, with a plate-glass window, in which room there was a Burtol plant for cleaning and drying articles ; (*c*) a "steam-pressing room," in which there was a pressing machine worked by steam, and tables for marking and packing goods ; (*d*) a room behind the last mentioned room in which there was a hot box, an electric drier, electric irons and tables on which employees worked when they took spots out of articles and ironed articles ; and (*e*) a boiler house in which steam was generated to be used in some of the machines.

On the first floor there were two rooms : a room in which articles received for cleaning were repaired and which was also used as a mess room, a store-room and an office, and another room which had been equipped as a bathroom and lavatory and was also used for wet-washing articles sent to be cleaned.

The two rooms on the second floor were not used for any purpose.

Six persons were employed on the hereditament : a manageress, one person to attend to the cleaning machine, one presser and three persons engaged in spotting and finishing the general work, and one or other of these six

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persons attended to the receiving and despatch of articles; but no member of the staff was specifically employed to attend to the counter.

In sub-para. 6 of para. 8 it was stated that the respondents occupied and used the hereditament for cleaning and for repairing garments left for cleaning, and (to a very small extent) for dyeing. All the articles received by the respondents were cleaned, dyed, or repaired on the premises, except that gloves and raincoats, and sometimes flannel trousers, were sent by the respondents to another firm for cleaning. No articles when cleaned were displayed on any part of the hereditament. The respondents dealt direct with members of the public, and did not work for any other firm. Articles received for cleaning were brought to the hereditament by customers and by the respondents' vanmen, who collected from two receiving offices maintained by the respondents at Gerrard's Cross and Beaconsfield, and from an agency at Harefield and from customers' houses in response to orders received by post or telephone. Not more than one-third of the articles received at the hereditament was brought there by the customers themselves. Most of the articles brought by the customers to the hereditament were, after cleaning, delivered to the customers by the respondents' vanmen.

An essential part of the Burtol plant for cleaning and dyeing articles, already referred to, was a hydro attached thereto which operated at 350 revolutions a minute for the purpose of drawing out of the article the chemicals used in cleaning it. That plant was placed in the front of the premises so that the public could have an idea how modern cleaning was carried out, and to obtain the maximum of light necessary for cleaning, operating and ventilation.

The hereditament was registered as a factory under the Factory and Workshop Act, 1901.

The respondents contended (1.) that the hereditament was an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 (1); (2.) that the hereditament was occupied and used primarily for industrial purposes, and partly for non-industrial purposes, and that an apportionment of the net annual value should be made under the provisions of s. 4 of the Act of 1928 (1); (3.) that the hereditament was not primarily used as a retail shop.

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(1) Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1.) In this Act the expression 'industrial hereditament' means

The appellants contended (1.) that the work carried on in the hereditament was repair work; (2.) that the hereditament was a retail shop as defined by s. 3, sub-s. 4, of the Act of 1928 (1); (3.) that the hereditament was primarily occupied and used for the purposes of a retail shop; (4.) that the hereditament was not an industrial hereditament.

In para. 11 of the Case the decision of the court of quarter sessions was stated—namely, that it accepted the contentions of the respondents, and held that the hereditament was an industrial hereditament, but that, as the two front rooms on the ground floor comprised a retail shop, the net annual value of 97*l.* would have to be apportioned—and the parties having agreed that the proper apportionment on the basis of that finding was 59*l.* for industrial purposes and 38*l.* for non-industrial purposes the quarter sessions ordered that the valuation list be amended accordingly and that the rateable value of the hereditament should be altered to 53*l.*

The question for the High Court was whether on the facts stated in the Case the court of quarter sessions had come to a correct determination in law.

On October 15, 1936, the case was heard by the Divisional Court (Lord Hewart C.J., du Parcq and Goddard JJ.), and the following judgments were delivered:—

a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop:

Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say— . . . . (*b*) the purposes of a retail shop; . . . ."

"(4.) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:— . . . . 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on; . . . ."

(1) See note (1) ante, p. 644.

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Lord Hewart C.J. This is a special case stated by the rating appeals committee of Middlesex quarter sessions under the Rating and Valuation Act of 1925, s. 31.

The question was whether a certain hereditament in High Street, Uxbridge, was or was not properly to be regarded as an industrial hereditament. The quarter sessions decided that the hereditament should be treated and assessed as an industrial hereditament.

The question for this Court is whether, upon the materials which were before it, that court, in so finding, came to a correct determination in law.

[His Lordship stated the facts and the contentions of the parties, and continued as follows:] The court of quarter sessions had the duty of ascertaining the facts and coming to a true conclusion in fact, and having had their attention directed to the relevant decisions in this labyrinth-like class of cases that court accepted the contentions of the respondents and held "that the said hereditament was an industrial hereditament." In other words, the court of quarter sessions found as a fact, so far as it was matter of fact, that the hereditament was an industrial hereditament. But the quarter sessions found also that two rooms in that hereditament comprised a retail shop and, therefore, that the net annual value ought to be apportioned. On the question of apportionment fortunately there was no controversy, it being agreed that certain figures should be put in the valuation list. It is apparent, therefore, that the question before quarter sessions was the difficult question: What is the primary use of this hereditament? Having heard all the evidence the court came to the conclusion that this hereditament was occupied and used primarily for industrial purposes.

I am not at all prepared to say that, in coming to that conclusion, the court of quarter sessions was wrong. Undoubtedly there are difficulties in the cases, and with a little ingenuity it is possible to present a plausible argument on either side of this case. But I did observe in the argument which we have heard to-day—and I observed it not for the first time—a tendency to exaggerate the importance of

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particular phrases which in the course of a long and varied controversy happen to have been employed for the purpose of arriving at the true conclusion upon the individual facts.

The scheme of this s. 3 is happily rare. It begins with a general provision as to the meaning of the expression: "industrial hereditament." It is to mean, among other things, a factory or workshop; but that general rule is subject to a proviso, and a factory or workshop is not to be included in that expression if it is primarily occupied and used for any of a series of purposes or combination of those purposes, one of which, (*b*), is "the purposes of a retail shop." So it begins—as in this case—with a factory. That will come within the expression "industrial hereditament," but not if it is primarily occupied and used for the purposes of a retail shop. The purposes of a retail shop are limited by the definition of retail shop in s. 3, sub-s. 4: "'Retail shop' includes"—that term is wider than "means"—"any premises of a similar character where retail trade or business" and then in brackets "(including repair work) is carried on." In the infinite variety of human circumstances and of businesses it happens that, in the arguments which have arisen during the past few years about particular premises, phrases have been used such as "the public physically resorting thereto." That phrase is used to indicate an element of what may be regarded where the question is whether particular premises are a retail shop; but it would, of course, be fallacious to draw the inference that any premises to which the public physically resorts, or in and about which accommodation is provided so that the public may physically resort thereto, must be a retail shop. Again, stress has been laid, in order to turn the scale in a particular case, upon the term "repair work." If premises in other respects satisfy the definition of "retail shop," and the facts are such as to lead to the conclusion that the true view of the premises is that they are a retail shop, then it matters not that repair work is carried on upon those premises. It would also be fallacious to turn that statement the other way round and say: "If repair work is carried on in those premises, those premises must be a retail shop." Again,

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stress is laid, for particular purposes, in particular cases, upon the epithet "retail"—the purposes of a retail shop. What is the antithesis of "retail"? It is "wholesale." But again, it would be fallacious to infer that where the business on premises is not wholesale, it follows that those premises are a retail shop.

The only course that is open to a court of quarter sessions in dealing with a particular case is, first, rightly to understand, if it is possible, the long series of decisions which has been given, and then to apply the law so interpreted to the individual facts. I see no reason in this case for thinking that the court of quarter sessions misdirected itself in point of law. On the contrary, I think it is apparent that that court directed itself rightly. It has found that a particular part of this hereditament comes within the definition of "retail shop," and, therefore, cannot be regarded as an industrial hereditament or as part of an industrial hereditament; and, on the other hand, addressing its mind to the only real question: What was the purpose for which this hereditament was primarily occupied and used? it has come to the conclusion that that purpose was not the purpose of a retail shop. Although, no doubt, by applying particular passages in judgments which have been delivered, it is easy to make out a plausible argument on the other side, I am not in the least prepared to say that the conclusion of the court of quarter sessions was wrong. I think there was evidence, and sufficient evidence, before that court to justify the conclusion which has been arrived at, and, therefore, it seems to me that this appeal should fail, and ought to be dismissed.

du Parcq J. I agree. As I understand it, the argument of Mr. Comyns Carr is that while, of course, these premises are a factory, the court of quarter sessions was bound to hold upon the evidence that the factory was primarily occupied and used for the purposes of a retail shop—giving to that expression the extended definition contained in s. 3, sub-s. 4, of the Act. He says that upon the findings of the quarter sessions a part—not more than one-third—of the articles received at the hereditament in order that work might be done upon them was brought there by the customers themselves; and that where customers are invited to resort to the hereditament to bring their work there for repair, and accommodation is provided for them, there is a retail shop within the extended definition. He says, further, that in addition to that one-third of the articles received, a further unspecified quantity of articles was received from customers' houses, in response to orders by post or telephone, and that they must be regarded exactly in the same way as articles brought by customers, because, in dealing with a baker's shop, Lord Dunedin said that retail trade was carried on just as much when loaves of bread were delivered by vanmen, or when orders were taken by roundsmen, as when orders were taken from or goods handed to customers over the counter. He says, therefore, that on these materials it is impossible to say that quarter sessions could have held as a matter of law that such a substantial part of the business was other than retail business, or that the premises could be treated as an industrial hereditament. What the court of quarter sessions has done, of course, is to treat the premises as an industrial hereditament, but in part as a retail shop, and to recognize that they are subject to apportionment.

I have stated the argument, as I understand it, and I agree with my Lord that it fails. I think that Mr. Comyns Carr has attempted to base too much upon the speech of Lord Dunedin in *Finn* v. *Kerslake*. (1) It is quite true that Lord Dunedin, dealing with the baker's shop, said that the sale to hotels, etc., was typical retail trade, and that the orders given to roundsmen were just part of the ordinary business of a retail shop. That is a statement with which, I should think, nobody would quarrel. It is true also that Lord Dunedin said: "As already stated, I am of opinion that the dissection of a unified business such as is in fact carried on here is not justified." Those words: "such as is in fact carried on here" are important; and if one looks at the speech of Lord Thankerton in *Toogood's* case (2) these

(1) [1931] A. C. 457, 485.

(2) [1932] A. C. 663.

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words are to be found (1): "My Lords, I observe a tendency in certain of the judgments in the Courts below to put a wider construction than is justified on the views expressed in this House in *Finn's* case (2); those views—e.g., as to dissection of a unified business—are expressly confined to the facts of that case." Now in *Toogood's* case (3) the goods dealt in by the firm carrying on business on the hereditament were all sold to customers other than the trade. Some were sent to a retail shop, and some were despatched directly to customers who sent their orders (just as in this case some goods were sent for from customers, in response to orders received by post or by telephone); and some chattels were stored upon the premises which were not manufactured by Messrs. Toogood and were offered for sale to the public. The House of Lords held that the premises were not used to any material extent as a retail shop within the extended definition. When the House of Lords said they were not used to any material extent for that purpose, it amounted to saying that the extent to which they were so used could be disregarded, and that the premises could be dealt with as if they were not to any extent used as a retail shop. They were not a retail shop in any part of them, or any substantial part of them, and were not taken out of the definition "industrial hereditament." What was held in that case was that if it be found that the public do not resort to premises, it cannot therefore be said that the premises are not a retail shop, and, as my Lord has pointed out, it is a very obvious fallacy to argue from that that if it can be said that to some extent the public do resort to the premises, then the premises must be regarded as a retail shop. It is to my mind doing no injustice to Mr. Comyns Carr's argument to say that that fallacy lurks in the propositions which he advanced.

I take the view in this case that the quarter sessions had a very difficult question of fact to determine. In my view, they have approached it in the right way. They have ascertained that not more than one-third of the articles received in the hereditament are brought there by the customers themselves; the remaining two-thirds come there in such circumstances that, in my view, but for the one-third, it would plainly be wrong to consider that these premises came within the definition of a "retail shop." I think the quarter sessions were right in asking themselves the question: What is the result of finding that one-third of the business done is such as may fairly be described as retail trade, and two-thirds of it such as ought not to be so described? That seems to me plainly to be a question of fact. It would be very wrong, as I think, for this Court, upon a Case stated, to say, for instance: "Oh, if it had been one-fifth or one-sixth or one-seventh, they might have been right, but because it is one-third they are wrong." It may be—I express no opinion about it—that if the quarter sessions had come to a different conclusion upon the facts, we could not have interfered. I do not think it was a very easy question for them to decide. I see no grounds upon which we can set aside their decision upon this case, as they have stated it.

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(1) [1932] A. C. 672.
(2) [1931] A. C. 457, 485.
(3) [1932] A. C. 663.

For these reasons, I agree with the judgment of my Lord, and I think that this appeal should be dismissed.

GODDARD J. As I respectfully agree entirely with the judgments given by my Lords, I only want to add a very few words, mainly on the contention of Mr. Comyns Carr that there was no evidence upon which the quarter sessions could find as they did find. What I think perhaps has been, or appears to have been, overlooked in his argument, is that the tests which have been laid down, or the points which have been emphasized by the House of Lords, are tests for determining whether a place is a retail shop. But that is not a question which the quarter sessions have to decide. They have to decide in matters of this sort whether the premises are primarily used as a shop.

That concedes that the premises are a retail shop, and on that point, when a question of this sort arises, and this point is raised, we start with the assumption that the premises are a retail shop in some degree. The quarter sessions have then to apply their minds to the question whether or not the premises are primarily a retail shop. In view of the reference with approval to the *St. Cuthbert's Co-operative Association Case* (1) by Lord Dunedin in his speech in the House of Lords in *Turpin's Case* (2), it seems to me that it must follow that if the business of the respondents in this case is being conducted entirely by collecting garments from receiving offices to which the public had sent them, it could not be said that the premises at Uxbridge, where the cleaning was done, was a retail shop at all. What difference there can be between the public sending their garments to the receiving office of the respondents, or handing them direct to a vanman who calls for them at the house instead of calling for them at the receiving office, I am at a loss to understand.

Therefore, it seems to me that we have a finding of the quarter sessions that two-thirds of the business carried on at these premises does not come within the term "retail business," and that a third of it can fairly be described as business done in a retail shop. If that is so, it seems that what is being said is that if on a particular hereditament two-thirds of the business is of a non-retail shop character, and one-third of the business is of a retail shop character, this Court is bound to hold as a matter of law that the premises are used primarily as a retail shop. I decline to hold anything of the sort, because one can easily imagine that if it were so held all sorts of anomalies might arise. Having read the Case, I am far from saying that I should necessarily have come to the same conclusion of fact as that to which the court of quarter sessions came. I am expressing no opinion upon that question of fact, because it is not open to me to do so sitting in this Court. From the way in which the Case is stated it appears to me, however, that the quarter sessions had in their minds the very things which the Appellate Courts from time to time have said ought to be in their minds in considering this very difficult question. They have set out at great length an exact description of the premises, of the exact way the business is worked, and so on, and I think the correct inference

(1) 1931 S. C. 386.

(2) [1931] A. C. 452, 470.

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is that the justices, having, as I think, ample evidence before them, did apply the right principle, and whether one agrees with their decision on a question of fact or does not, does not matter. They have come to a decision on evidence and on applying the proper principles of law, and, therefore, we cannot interfere with their decision.

Appeal dismissed.

The assessment committee appealed. The appeal was heard on March 9, 10, and judgment was given on March 22, 1937.

Comyns Carr K.C. and *J. Scott Henderson* for the assessment committee, appellants. The question is whether the hereditament under discussion is an " industrial hereditament " or a " retail shop " within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3. (1)

The Divisional Court were wrong in holding that that question was one of fact and that the decision of the court of quarter sessions was a finding of fact by which they were bound. The question is one of law, the answer to it depending upon the legal inference to be drawn from the particular facts found relating to the hereditament. That that is so appears generally from the cases in the Court of Appeal and the House of Lords which will be cited in the course of the argument, and also more particularly from the cases of *Reg.* v. *Bridge* (2) and *Inland Revenue* v. *Moffat and Others.* (3)

[Greene L.J. In *Farmer* v. *Cotton's Trustees* (4) Lord Parker said: " Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."]

If that question be a question of fact, there was no evidence upon which the quarter sessions could find as a fact that the purpose for which part of the hereditament was primarily occupied was that of an industrial hereditament as distinct from a retail shop.

(1) See note (1) ante, p. 644.
(2) (1890) 24 Q. B. D. 609.
(3) 1930 S. C. 412.
(4) [1915] A. C. 922, 932.

The Divisional Court were wrong in law in affirming the decision of the court of quarter sessions that the hereditament consists in part of an " industrial hereditament " and in part of a " retail shop " within the meaning of s. 3 of the Act of 1928. The hereditament consists solely and entirely of a " retail shop " within the meaning of that section. By sub-s. 1 of that section, the expression " industrial hereditament " does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for (inter alia) the purposes of a retail shop ; and sub-s. 4 provides that " retail shop " includes any premises of a similar character to a shop where retail trade or business, including repair work, is carried on. A hereditament may accordingly be a retail shop within these provisions which possesses the following features—namely : Where it is occupied and used as a factory or workshop. Where it is primarily occupied and used for the purposes of a shop, possessing the physical characteristics of a shop such as window display and counter, and being occupied and used as a shop. Where a trade or business is carried on in it. The word "trade" means the buying and selling of commodities, but the word "business" has a wider meaning, including the rendering of services of any kind. In *Harris* v. *Amery* (1) Willes J. said that " ' business ' has a more extensive signification than ' trade ' " ; and in *Smith* v. *Anderson* (2) Jessel M.R. said : " anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification." Further, the trade or business must be of a retail description. That is to say, it must be transacted with members of the public directly, whether personally, or by letter or telephone, or by means of roundsmen or collectors, and not indirectly through a middleman. In order to be a retail shop the hereditament should include a place to which members of the public can resort personally if they wish to do so, and it should be occupied and used for the purpose of dealing with them personally when they do resort to it. It

(1) (1865) L. R. 1 C. P. 148, 154. (2) (1880) 15 Ch. D. 247, 258.

may be a retail shop although it includes a factory: *Finn* v. *Kerslake.* (1)

[GREENE L.J. In the Oxford Dictionary "retail" is defined as meaning "The sale of commodities in small quantities."]

Finally, the hereditament may be a retail shop when the business carried on upon it includes repair work. Such work includes the work of cleaning articles. In *Greg* v. *Planque* (2) the Court of Appeal considered that the word "repairs" included the sweeping of a chimney. It is submitted that even apart from authority the hereditament here in question possesses all these features of a retail shop. There can be no dispute that it is occupied and used as a factory or workshop, seeing that it is occupied and used for the carrying on of the processes of cleaning and dyeing. Its primary purpose and user are those of a "shop." It is one of a row of shops. Its own construction and appearance are those of an ordinary shop, among its features being a room containing a counter and a large window facing the street. There is a finding of fact in the Case that there is a shop on the premises. The work of cleaning and dyeing carried on upon the premises is a "business," inasmuch as it involves the labour of the respondents for profit; and it is a business as distinct from a trade because it includes the rendering of services. Further, the business carried on at the premises is a "retail" business, because provision is made for members of the public dealing with the respondents directly, either by visiting the premises in person or through the respondents' vanmen. The fact that only one-third of the business was done by customers resorting to the premises in person and all the rest through vanmen does not prevent the premises from being a retail shop. Finally, the business carried on includes "repair work" since it includes the cleaning of articles. The fact that the premises are registered as a factory under the Factory and Workshop Act, 1901, is not inconsistent with their being a retail shop for the purposes of the Act of 1928. The hereditament as a whole is of a similar character to and

(1) [1931] A. C. 457, 485.

(2) [1936] 1 K. B. 669.

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is primarily occupied and used as a shop where retail business, including repair work, namely cleaning, is carried on, and it is therefore in its entirety a retail shop within s. 3 of the Act of 1928. That being so it cannot be analysed or dissected into two distinct parts consisting respectively of an industrial hereditament and a retail shop, and therefore it is not necessary, or even possible, to apportion its value between two such distinct parts.

There has been some variation of judicial opinion in regard to the rating of hereditaments consisting of contiguous factories and shops, but the decided cases support the view that this hereditament as a whole is a retail shop. The first case in point was *Inland Revenue* v. *Gunn, Collie & Topping* (1), where premises were occupied by bespoke retail tailors, the ground floor being used for the display of cloth, taking of orders, measuring, cutting and fitting, and the upper stories for the accommodation of the working tailors. It was held by the majority of the Court of Session that the purpose of the hereditament could be dissected, and that it was not primarily occupied and used for the purpose of a retail shop and therefore fell within the definition of an industrial hereditament. Lord Hunter, however, in a dissentient judgment, expressed the view (2) that as nothing was manufactured in any part of the premises except for the purpose of satisfying the requirements of customers to whom goods had been sold retail the primary purpose for which the building as a whole was used was the carrying on of a retail business, that the manufacture of suits was ancillary to the retail business of selling suits, and that the hereditament was a retail shop. That dissentient judgment of Lord Hunter was approved by Lord Dunedin in *Finn* v. *Kerslake* (3), where it was held by the House of Lords that the bakehouse in the rear of a baker's shop, which made goods for the business, although a factory, was an ordinary part of a baker's shop, and that the whole hereditament was primarily occupied and used for the purposes of a retail shop, and was therefore not an industrial

(1) 1930 S. C. 389.
(2) Ibid. 401.
(3) [1931] A. C. 457, 485, 487.

hereditament. Lord Dunedin there expressed the view that "the orders given to roundsmen are just part of the ordinary business of a retail shop," and that "the dissection of a unified business such as is in fact carried on here is not justified." The House of Lords in that case reversed the decision of the Court of Appeal (1), where Scrutton L.J. had relied on the decision of the majority in *Inland Revenue* v. *Gunn, Collie & Topping*. (2) The nearest case to the present is *Pritchard* v. *William Lewis & Sons* (3), where there was a retail shop in the front of the premises facing an important street, and the warehouses at the back were used for seed cleaning processes. The Court of Appeal there held that the primary purpose of the whole of the premises was not a process of sale but a process of manufacture. In so holding the Court in part followed their decision in *Hines* v. *Eastern Counties Farmers' Co-operative Association* (4), which was subsequently affirmed by the House of Lords (5), and in part followed their decision in *Finn* v. *Kerslake* (6), which was subsequently reversed by the House of Lords. (7) The decision of the Court of Appeal in *Pritchard* v. *William Lewis & Sons* (3) was through a mistake not appealed against. In *Turpin* v. *Middlesbrough Assessment Committee* (8) and *Kaye* v. *Eyre Brothers, Ld.* (9), the House of Lords held that a garage and motor repair depot occupied and used for repairing motor-cars, motor-boats and tractors brought or sent to the premises by the owners, for garaging cars, and for the sale of petrol and small motor accessories, were primarily occupied and used for the purpose of a retail shop. In *Wilkinson* v. *Sibley* (10) occupiers of a hereditament carried on business both as outfitters and bespoke tailors. The hereditament consisted of a workshop, an office, and a retail shop in which the occupiers sold articles made in the workshop. It was mainly used as a workshop, but partly as a retail shop. The Court of Appeal held that it was a retail shop and not an

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(1) [1931] 1 K. B. 421, 509.
(2) 1930 S. C. 389, 395.
(3) [1931] 1 K. B. 456, 502.
(4) [1931] 1 K. B. 446.
(5) [1931] A. C. 456, 477.
(6) [1931] 1 K. B. 421.
(7) [1931] A. C. 457, 485.
(8) [1931] A. C. 451, 470.
(9) [1931] A. C. 451, 475.
(10) [1932] 1 K. B. 194.

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industrial hereditament. In *Toogood & Sons* v. *Green* (1) a firm of seed merchants owned and occupied a hereditament consisting of a warehouse used for cleaning and testing seeds for sale, and certain subsidiary buildings, including offices, which were admittedly not used for industrial purposes. It was held by the Court of Appeal that the hereditament was used for the purpose of a retail shop; but the House of Lords (1) held that the hereditament was not primarily occupied and used for that purpose but was an industrial hereditament. In so holding the House of Lords did not weaken the effect of the observations of Lord Dunedin in *Finn* v. *Kerslake* (2), where the facts were very different. It appears from the judgment of Lord Thankerton in *Toogood's* case (1) that if premises are so constructed that a place is provided to which members of the public can resort for trade or business, and there is an invitation to them to resort there for trade or business, the premises are a retail shop, even though no person in fact resorts there. In *Toogood & Sons* v. *Green* (1) the supposed shop had none of the physical features of a retail shop, and it is therefore distinguishable from the present case, where the shop has these features. Moreover, here all the goods passed through the shop, and though they were not sold there they were repaired, and therefore come within the extended definition of "retail shop" in s. 3, sub-s. 4. As to the words "of a similar character" to a shop in that definition, Lord Dunedin said in *Turpin's Case* (3) that these words even if they include, are not limited to, physical features of the premises, but must include also similarity of character in other respects to a retail shop. The present case is entirely distinguishable from *St. Cuthbert's Co-operative Association, Ld.* v. *Assessor for Edinburgh* (4), where the branch shops or depots at which the articles were collected were separate hereditaments situated at a distance from the factory.

Trapnell K.C. and *W. G. H. Cook* for the respondents.

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(1) [1932] 1 K. B. 204; [1932] A. C. 663, 674.
(2) [1931] A. C. 457, 485-488.
(3) [1931] A. C. 451, 473.
(4) 1931 S. C. 386.

The hereditament in question is as a whole an "industrial hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1, and it should be derated as a whole.

If the hereditament is not wholly an industrial hereditament, then it is occupied and used primarily as an "industrial hereditament" and partly as a "retail shop" within the meaning of that sub-section, and there should be an apportionment of its value under s. 4 of that Act.

The decision of the court of quarter sessions that the hereditament comprised both an industrial hereditament and a retail shop was a finding of fact which was binding on the Divisional Court and is binding on this Court.

If that decision was not a finding of fact, then that decision and the decision of the Divisional Court which affirmed it are decisions in law that the hereditament consists in part and primarily of an "industrial hereditament" and in part of a "retail shop" within s. 3, sub-s. 1, of the Act, and that there should be an apportionment of value between them, and these decisions are right and should be affirmed. The questions in this case, as in all cases of this particular kind, are whether the hereditament is in fact occupied and used wholly as an industrial hereditament, or wholly as a retail shop, or partly as the one and partly as the other. If the hereditament is in fact occupied and used wholly as an industrial hereditament or wholly as a retail shop, the case is simple and can easily be disposed of. It is when the hereditament is in fact occupied and used in part as an industrial hereditament and in part as a retail shop that the rating of it becomes a matter of difficulty. In that case it is necessary to consider whether the two parts are to be regarded as forming one hereditament only or two separate hereditaments. Where the two parts are to be regarded as together constituting one hereditament only, it will be necessary, in order to determine to which class under the Rating Acts the hereditament in question belongs, to consider and compare the purposes for which the parts are used and to ascertain which is the primary purpose. In every such case the question is one of degree, the character of the hereditament depending upon that of the part whose purpose is primary. If the industrial purpose is primary and the shop purpose merely ancillary, the Court will treat the hereditament as industrial; but otherwise the Court will treat the hereditament as a retail shop. The purposes for which each part of the hereditament is occupied and used may, however, be so distinct that the two parts must be regarded as forming, not one, but two separate hereditaments, the one industrial and the other non-industrial. In that case it will be necessary to apportion the rateable value between the two separate hereditaments. It is submitted that the true inference from the facts stated in the Case is that this hereditament is wholly an industrial hereditament, every part of it that is in use being used solely for the purpose of carrying on the work of cleaning and dyeing. If it is not wholly used for that purpose, at all events the greater part of it is so used and only the smaller part is used as a retail shop doing business with customers directly. This appears from the statement in the Case that not more than one-third of the articles received at the hereditament were brought there by the customers themselves. It is said on behalf of the appellants that the expression " retail shop " according to the extended definition of it in s. 3, sub-s. 4, of the Act includes any premises of a similar character to a shop where retail business including repair work is carried on; that the work of cleaning carried on at this hereditament is repair work within that definition and that the hereditament is in all respects and entirely a " retail shop " within s. 3, and therefore not derateable. Repair work, however, means the making good of damage, and therefore the work of cleaning and dyeing carried on at this hereditament is not repair work and does not bring the hereditament or at least the greater part of it within the definition of retail shop. In none of the cases in which premises have been held to be a retail shop has the work of cleaning been done. The present case is distinguishable from the third case dealt with in *Inland Revenue* v. *Moffat and Others* (1), where the work done at the premises, namely that of mending boots and shoes, was clearly repair work. The greater part of this hereditament is occupied and used for the work of cleaning and dyeing articles, and a smaller part of it is used only for receiving and despatching articles, and, that being so, the true view is that the hereditament comprises both an industrial and a non-industrial part, and its rateable value should be apportioned between these two parts. The case of *Finn* v. *Kerslake* (1), in which it was held by the House of Lords that a baker's shop and a bakehouse behind it where wares were made for the shop constituted together a retail shop, is distinguishable from the present case, because in that case the same kind of work or business was carried on upon both parts of the hereditament, whereas here different kinds of work were carried on upon the two parts of the hereditament. In that case there was not, as there is in the present case, a finding that only a part of the hereditament was a retail shop. The mere fact that in such a case a large part, or even the whole, of the goods dealt with in the factory go through the adjoining shop, is not enough to make the hereditament as a whole a retail shop. It appears from the judgments in that case that it was not there intended to lay down any general principle of law, but only to deal with the facts of that particular case. The same view of that case was also taken by the House of Lords in the later case of *Toogood & Sons* v. *Green*. (2) In the case of *Toogood & Sons* v. *Green* (2) itself it was held that a hereditament consisting of a large factory with a subsidiary office where orders from customers were received was not primarily occupied and used as a retail shop, but was an industrial hereditament. Here the premises, or at least the greater part of them, are no more occupied and used for the purposes of a retail shop than they were in that case. This hereditament is in part a factory, and it must be included in the class of industrial hereditaments unless it can be shown that its primary use is not that of a factory: *Bailey* v.

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(1) 1930 S. C. 412.

(1) [1931] A. C. 457, 485.
(2) [1932] A. C. 663.

Potteries Electric Traction Co. (1); and that cannot here be shown consistently with the facts stated. This case is distinguishable from *Ideal Cleaners and Dyers, Ld.* v. *West Middlesex Assessment Committee* (2), because here the receiving office or shop was not a separate outside branch, but formed a small part of the industrial hereditament itself, and in view of the primary purpose for which the hereditament is used it should be held to be an industrial hereditament.

Comyns Carr K.C. replied.

1937. March 22. The following judgments were read:—

Greer L.J. (whose judgment was read by Slesser L.J.). This appeal raises a difficult question with regard to the interpretation and application to the facts stated by quarter sessions in a special case of the definition section contained in what has been called the Derating Act of 1928 (18 & 19 Geo. 5, c. 44). The purpose of this Act was to cause valuation lists to be prepared which would enable Parliament by a later Act (passed in the next year) to grant special rating exemption to industrial hereditaments. The 1928 Act required a special list of industrial hereditaments to be prepared by assessment committees so as to facilitate the derating provisions of the 1929 Act. For this purpose it was necessary to define industrial hereditaments. Among the specified classes of industrial hereditaments defined by the Act of 1928 were factories within the meaning of the Factory Acts. But it was recognized that there might be hereditaments that were factories within the Factory Acts that ought not to be classed as industrial hereditaments. Therefore, it was provided by s. 3 that the expression "industrial hereditament" should not include (inter alia) a hereditament primarily occupied and used as a retail shop, and "retail shop" was defined as "any premises of a similar character (that is, similar in character to a shop), where retail trade or business (including repair work) was carried on."

The question then arose for decision whether, when part of premises behind a shop were used entirely for shop purposes,

(1) [1931] 1 K. B. 385.

(2) (1930) 46 Times L. R. 371.

such part could be deemed to be primarily used for industrial purposes when it was solely used as ancillary to the shop, that is, for the purpose of preparing goods for sale in the shop, and whether the factory was still to be considered ancillary to the shop if orders were brought to it by the shop's vans as the result of orders taken by roundsmen. This question was finally determined by the Court of Appeal and the House of Lords in *Finn* v. *Kerslake*. (1) That case is still binding on this Court, notwithstanding the expression of opinion in *Toogood & Sons, Ld.* v. *Green* (2) to the effect that the decision depended on the special facts of the case. In any case in which the facts found by the tribunal of fact are in essence the same as in *Finn's* case (1) the Court must follow the decision of the House of Lords in that case. In the present case the premises could in appearance and character be properly described as a shop. Though the word "retail" is generally used as indicating sale of goods by retail, it appears to me quite plain that in s. 3, sub-s. 4, of the Derating Act it has a larger meaning. It seems to me that the words "retail trade or business" include premises in which a shop is used for the purpose of supplying services to customers who resort to the shop direct, though it does not include premises like Toogood's where the warehouse presents none of the physical appearance or characteristics of a shop.

In the present case the assessment committee in dealing with a proposal made by the occupiers of the shop decided that the hereditament was primarily used as a shop, and was not an industrial hereditament, and the occupiers appealed to quarter sessions, who stated a case under s. 31 of the Rating and Valuation Act, 1925. The facts found by the quarter sessions are stated in para. 8 of the Case, and it is unnecessary to read them at length. The essential facts are stated as follows in sub-para. 6: "The respondents occupy and use the said hereditament for cleaning and for repairing garments left for cleaning and (to a very small extent) for dyeing. All the articles received by the respondents are

(1) [1931] A. C. 457, 485. (2) [1932] A. C. 663.

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cleaned, repaired or dyed at the said hereditament except that gloves and raincoats and sometimes flannel trousers are sent by the respondents to another firm for cleaning. No articles when cleaned are displayed on any part of the said hereditament. The respondents deal direct with members of the public and do not work for any other firm. Articles received for cleaning are brought to the hereditament by customers and by the respondents' vanmen, who collect from two receiving offices maintained by the respondents at Gerrards Cross and Beaconsfield and from an agency at Harefield and from customers' houses in response to orders received by post or telephone. Not more than one-third of the articles received at the said hereditament is brought there by the customers themselves. Most of the articles brought by the customers themselves to the said hereditament are after cleaning delivered by the said vanmen."

The essential fact which, in my opinion, determines this appeal in favour of the assessment committee lies in the statement that the respondents deal direct with members of the public, and do not work for any other firm. It seems to me immaterial whether the customers' goods come direct to the shop in the respondents' vans or whether they are delivered in depots or agencies on their way to the shop. The determining fact is that the order comes from a customer, and not from any merchant or distributing firm, and the delivery is made to the customer. I think this is just as much a retail trade or business as was the business of the baker's shop in *Finn's* case. (1) As the facts are in essence the same as in that case, it seems to me unnecessary to refer to the numerous decisions in other Courts, Scottish or English, of which many were cited to us. Looking at the wording of the definition section in the 1928 Act, I should, in the absence of authority, be of opinion that the business carried on in the respondents' premises was primarily the business of a retail shop, and this view is confirmed by reference to the decision of the House of Lords in *Finn's* case. (1) It seems to me unnecessary to decide whether cleaning is repair work, though the reference to repair work indicates that retail shops are not to be confined to shops in which goods are sold.

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(1) [1931] A. C. 457, 485.

As we are differing from the very careful judgments of the Divisional Court, I think I ought to indicate in what respects I differ from the three judgments delivered by the three judges. I am inclined to think that if the Lord Chief Justice had felt that he had a free hand to differ from the quarter sessions he would have been inclined so to differ. Where I think he was wrong was in treating the quarter sessions' decision as a decision on a question of fact. I agree with the expression of opinion cited by Greene L.J. in the course of the argument (see *Farmer* v. *Cotton's Trustees* (1)) that where the facts are found by the tribunal of fact, the inference to be drawn therefrom is one of law and not of fact, unless the facts show that the question is one of degree. On the facts found by the quarter sessions and stated in the Case, I think the true inference as a matter of law is that the hereditament in question was a retail shop or business with a factory attached as ancillary to the business of the shop which retailed its services to its customers. It seems to me also to be involved in the decision of the House of Lords in *Finn's* case (2) and in *Toogood's* case (3) that the question to be determined on the facts stated in the Case called for a decision on a point of law, which they decided in *Finn's* case (2) in favour of the assessment committee, and in *Toogood's* case (3) in favour of the occupiers of a warehouse which had none of the characteristics of a shop. In *Finn's* case (2) it was decided that the fact that the vans in many cases took the products of the ancillary factory direct from that part of the hereditament which was a factory within the Factories Acts, did not cease to make it merely ancillary to the work of the baker's shop. In the present case the quarter sessions decided that part of the premises constituted a shop notwithstanding that no goods were being sold there, and they apportioned the valuation as 59*l*. for the factory and 38*l*. for the shop and other parts of the premises not used

(1) [1915] A. C. 922, 932.
(2) [1931] A. C. 457, 485.
(3) [1932] A. C. 663.

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for factory purposes. As they found that part of the premises constituted a retail shop, they ought to have gone on to consider whether the factory was used for any other purposes than supplying the cleaned and mended goods to the shop for re-delivery to the customers. As this was definitely established they ought, in my judgment, as a matter of law to have decided in accordance with *Finn's* case (1) that the whole hereditament which resembled a shop, and which was all used for the purposes of the shop, was not entitled to derating. As they did not do so, they were wrong in law in reversing the assessment committee. They ought to have affirmed it.

With regard to the judgment delivered by du Parcq J., I think it turns on a mistaken view of what was decided in *Toogood's* case (2), which we are bound to interpret as not being in any way inconsistent with the decision of the House of Lords in *Finn's* case. (1)

With regard to the judgment of Goddard J., it seems to me that he also failed to give effect to the decision in *Finn's* case (1), inasmuch as he concentrated his attention entirely on the part of the business which arose from the actual deposit of goods by customers at the shop, and attached no importance to the fact that all the business that came there, whether by vans or from the depots and agencies, came to the shop from retail customers.

For these reasons I have come to the conclusion that the appeal of the assessment committee should succeed and they should have their costs here and below and the list as settled by the assessment committee should be restored.

Slesser L.J. The respondents in this case carry on the business of cleaners and dyers in a hereditament situate in a shopping street in Uxbridge. On the ground floor there are two rooms, one with a counter for receiving and despatching goods and another with a plate-glass window in which is a machine for cleaning and drying, which are said in the special case (para. 11) to comprise a shop; all the rest of the ground floor and the

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(1) [1931] A. C. 457, 485.

(2) [1932] A. C. 663.

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first floor and a boiler-house have been held to be occupied and used for industrial purposes within the meaning of s. 4 of the Rating and Valuation (Apportionment) Act, 1928. On this finding the rating appeals committee of the Middlesex quarter sessions came to the conclusion that the hereditament was not primarily occupied and used for the purpose of a retail shop and, on the proportions being agreed by the parties, apportioned on the basis of 59*l.* for industrial purposes and 38*l.* for non-industrial purposes. From this decision the assessment committee appealed to the Divisional Court, contending that, on the facts proved or admitted, the proper conclusion in law should be that the whole hereditament was occupied and used for the purposes of a retail shop and therefore should not be derated at all. The Divisional Court dismissed this appeal.

In my opinion, although the two rooms facing the street have been held to be a retail shop, the finding can only be justified by having recourse to the definition of a retail shop contained in s. 3, sub-s. 4, of the 1928 Act. A retail shop is there said to include "any premises of a similar character where retail trade or business (including repair work) is carried on." Without this addition of retail trade or business, although the premises might have the physical characteristics of a shop, it could not properly be said to be "retail," a word which to my mind in its natural meaning involves buying and selling goods, though it may include places used for storing goods (per Mellor J. in *Pope* v. *Whalley* (1)), for trade has the technical meaning of buying and selling (per Willes J. in *Harris* v. *Amery*. (2)) But the services here rendered are clearly in the nature of a retail trade or business, for all the work is brought to be done and taken away when completed either by customers themselves or by vanmen receiving and returning from or to customers or receiving stations, without the intervention of a middleman, and on the facts as stated the actual work done being ancillary to the purposes of the shop, I do not think the evidence is capable of leading to other than one conclusion—namely, that

(1) (1865) 6 B. & S. 303, 313.

(2) (1865) 35 L. J. (C. P.) 89, 92.

the hereditament is occupied and used for the purpose of a retail shop within the meaning of the extended statutory definition, which includes any premises of a similar character to a shop where retail trade or business is carried on.

The leading cases most resembling the present one, where service rather than sales are to be considered, are the garage cases (though there actual repairs were effected), the clothes-repairing cases and the bakery case, *Turpin* v. *Middlesbrough Assessment Committee* (1); *Inland Revenue* v. *Gunn* (2); and *Finn* v. *Kerslake.* (3) In *Turpin's Case* (1), as in this case, the whole hereditament was registered as a factory and accordingly was to be taken to be an "industrial hereditament" unless it was primarily occupied and used for the purposes of a retail shop. There were windows exposing small accessories for sale, and outside the premises were three pumps for the supply of petrol to the public: sales took place daily. Much the larger part of the premises and practically the whole of the working time of the occupier and of his employees were devoted to repair work. No one was employed specifically for selling purposes. Lord Dunedin points out (4) that the hereditament is primarily occupied and used for the purpose of repair work without the intervention of any middleman. He points out that the words in the extended definition of a shop, the words "of a similar character," are not limited to the physical features of the premises, but that the character of the premises must be similar to the character of a retail shop. (In the present case many of the actual physical features of a shop are present.) He further points out that the garage is like a retail shop; they "are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein." He contrasts the case with that of the *St. Cuthbert's Co-operative Association* (5), where the public did not resort to the hereditament, but the articles repaired were collected at the appellant's branch shops throughout

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(1) [1931] A. C. 452, 470.
(2) 1930 S. C. 389.
(3) [1931] A. C. 457, 485.
(4) [1931] A. C. 452, 473.
(5) 1931 Sc. L. T. 144.

Edinburgh (to which the public resorted) and brought to the hereditament in question. In *Toogood's* case (1) it was similarly held on the facts that no accommodation existed in the premises to which the public might resort. From these observations of Lord Dunedin in *Turpin's Case* (2) it would appear that both requirements of the section, namely, the use and occupation (*a*) as a shop, (*b*) as retail, were satisfied in *Turpin's Case* (2), the former because the public could resort for the purpose of having services rendered, the latter in that the articles repaired were brought to the shop by the public themselves without the intervention of a middleman.

Once it is established that the premises are so used and occupied as a shop the language of Lord Hunter in *Inland Revenue* v. *Gunn* (3), which is expressly approved by Lord Dunedin in *Finn* v. *Kerslake* (4), becomes important. Speaking there of a "unified business" and the application of the test of primary purpose to such a case, Lord Hunter comments: "it may be said that as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the business is used is the carrying on of a retail business. . . . The manufacture or adaptation for sale of the cloth . . . . appears to me to be ancillary to the retail business of selling suits of clothing"; to which Lord Dunedin adds in *Finn's* case (4): "The dissection of a unified business such as is in fact carried on here" (a hereditament consisting of a baker's shop and bakehouse in the rear—the latter a factory) "is not justified." So in the present case on the facts, seeing that all the goods to be treated by way of cleaning or repair are brought to and despatched through the shop either by or to customers direct or by the agency of vanmen, as in *Finn's* case (4), and receiving stations, the business of cleaning and repairing is as much ancillary to the purposes of the shop as was the cleaning and repairing in the case of the garage in *Turpin's Case* (1), the baking in *Finn's* case (2), or the tailor's manufacture of clothes, in Lord Hunter's view, in *Gunn's* case. (3)

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(1) [1932] A. C. 663.
(2) [1931] A. C. 452, 473.
(3) 1930 S. C. 389.
(4) [1931] A. C. 457, 485, 487.

Thus, once the conclusion is arrived at that the whole business is a unified one, carried on " through " a shop—to use the language of Lord Thankerton in *Toogood's* case (4)—as Lord Dunedin has pointed out, strictly no question of dissection of purpose arises. The Divisional Court treated the decision of the quarter sessions as to primary purpose as one of fact and refused to disturb their finding. In my opinion the facts of the case require us as a matter of law to hold that this hereditament was used and occupied without dissection of purpose for the purpose of a retail shop, all other activities being but ancillary to that purpose, and consequently that this appeal succeeds.

GREENE L.J. The first question which arises in this case is whether the business carried on by the respondents upon their premises falls within the expression " retail trade or business (including repair work) " contained in s. 3, sub-s. 4, of the Rating and Valuation (Apportionment) Act, 1928. The word " retail " is according to the dictionaries confined to sales and it is not an accurate use of language to speak of, for example, " retail repairs," although in repair work, as in certain other kinds of work, there is a distinction analogous to that between retail and wholesale selling. For this reason the expression " retail shop " would not, in my opinion, by itself include the respondents' premises, and it is accordingly necessary to have recourse to the extended meaning given in the definition section which I have quoted. The definition is not happily worded. But in view of the fact that retail trade or business is said to include repair work, that is to say, repair work which by an easy analogy may be described as retail, I think that the words " retail trade or business " are in the context wide enough to cover the business of the respondents. I do not accept the view that the work of cleaning which

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(1) [1931] A. C. 452, 470.
(2) [1931] A. C. 457, 485, 487.
(3) 1930 S. C. 389.
(4) [1932] A. C. 663, 672.

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they carry on is " repair work," as was argued by Mr. Comyns Carr; this appears to me far-fetched.

The question as to the meaning of the word " retail " in this section was referred to by the House of Lords in *Turpin's Case* (1); but as the work there in question was repair work it was not necessary to come to any decision upon it. I do not find in that passage anything which suggests that the view which I take is wrong.

The other question is a rather more complicated one, although in my opinion when the relevant provisions of the statute are correctly construed and applied to the facts of the case it does not present any real difficulty. Under s. 3 of the Act read in conjunction with the definition section, a hereditament is not an industrial hereditament if it is " primarily occupied and used for . . . . the purposes of a retail shop including premises of a similar character where retail trade or business (including repair work) is carried on." Now the premises must be " of a similar character " to a retail shop and this similarity must exist not only with regard to " retail " character (which is already provided for in the words " retail trade or business ") but also with regard to " shop " character. It is not sufficient that retail business is carried on upon the premises if the premises are not a shop or similar to a shop. Now the essential element in a shop is that people can shop in it. If a concern conducts its business entirely by mail-order and does not invite the public to come to its premises to buy or provide accommodation for them, the premises from which its business is conducted are not a shop, even though its business be entirely retail in character. It is upon this point that the House of Lords in *Toogood's* case (2) took a different view from that taken by this Court.

Upon the facts of this case I am clearly of opinion that the hereditament in question is occupied and used for the purposes of a retail shop. But it is said that even if this be so, it is not " primarily " so occupied and used. It is upon this ground that the judgment of the Divisional Court is

(1) [1931] A. C. 452, 473.

(2) [1932] A. C. 663.

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based. du Parcq J. and Goddard J. rely for their conclusion upon the fact that not more than one-third of the articles received for cleaning at the hereditament is brought there by the customers themselves; the remaining two-thirds being brought in by vanmen who collect them in unspecified proportions from customers' houses, two receiving offices and an agency. It is not I think clear from the special case whether the court of quarter sessions based its decision upon the view that the hereditament as a whole is not occupied and used for the purposes of a retail shop or upon the view that it is not primarily so occupied. If they took the former view they were in my opinion wrong for the reasons which I have given. They were moreover wrong in law, since the question whether upon the ascertained facts the purposes for which the hereditament is used and occupied are those of a retail shop is in my judgment clearly a question of law: see *Farmer* v. *Cotton's Trustees*, per Lord Parker. (1)

The learned judges of the Divisional Court—at any rate du Parcq J. and Goddard J.—treat the decision of the justices as based on the latter of the two views which I have mentioned, and in this respect they treat it as a decision on fact. With all respect, I cannot agree. If justices decide that a hereditament is occupied and used for the purposes of a retail shop but is not primarily so occupied and used, it may with plausibility be said that the question of primary user is in practice equivalent to a question of fact and that their conclusion upon it ought not to be disturbed. But this is a proposition which must in any event be applied with great caution since any such finding presupposes that the words "primarily occupied and used" in the statute have a certain meaning and so involves a tacit decision upon a question of law. In my opinion, if the justices are to be treated as having decided this case upon the view that the hereditament is not primarily occupied and used as a retail shop, they misdirected themselves as to the true meaning of the words "primarily occupied and used" in their application to the facts of this case. To those who prefer (inaccurately, in my respectful opinion) to treat such a decision upon the present facts as a pure finding of fact, I would answer that in my judgment there was no evidence upon which the justices could so find.

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(1) [1915] A. C. 922, 932.

I will now proceed to deal with the question upon its merits, unembarrassed by these considerations. The first point to notice in construing the statute is that the unit for rating purposes is the hereditament, and it is the nature of the user of the hereditament as a whole that falls to be considered. This is not a case where a defined portion of the hereditament is allocated to one user exclusively. The user of the whole hereditament is user for the purposes of a retail shop since every part of it is used for those purposes. But it is said that the whole user of the hereditament is not for the purposes of a retail shop. The learned judges of the Divisional Court appear to have taken the view that as two-thirds of the business was done by collection it followed that two-thirds of the user were for purposes other than those of a retail shop. Thus Goddard J. says that if the whole of the business had been done by collection the user could not have been said to be for the purposes of a retail shop. I agree. But the reason would have been that in that case there would have been no shop. It is one thing to say that premises used for a retail business of repair or cleaning, conducted entirely by collection, are not used for the purposes of a retail shop—such premises, as I have already pointed out, cannot be said to be of a "similar character" to a retail shop since the necessary shop element is absent. But it is a totally different thing to say that where the whole of the hereditament is used for the purposes of a retail shop the fact that a part of the business of the shop is conducted by collection is to be treated as removing the hereditament pro tanto from the category of a retail shop. This distinction forms the basis of the decision in *Finn's* case (1), if I understand it correctly. Once it is ascertained that the entire hereditament is occupied and used for the purposes of a retail shop, the fact that part of the business of the shop is conducted by means of roundsmen or collectors appears to me to be irrelevant, since this is merely one of the

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(1) [1931] A. C. 457, 485.

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ordinary ways in which retail shop business is conducted. In my judgment the essential facts of this case are indistinguishable from those in *Finn's* case (1), and it must be decided accordingly. To use the words of Lord Dunedin in that case, the business is a "unified business" and it is not legitimate to "dissect" it into that part which is physically conducted in the shop and that part which is in part physically conducted away from the shop. The whole of the business is shop business conducted from and by the shop, and that in my judgment disposes of the matter.

I should add that if the view which I have expressed is correct, there is no case for an apportionment under s. 4 of the Act.

Appeal allowed.

Solicitor for the appellants: *H. G. Greenwood.*
Solicitors for the respondents: *Ellis & Fairbairn.*

(1) [1931] A. C. 457, 485.

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Landlord and tenant—Rent Restriction Acts—House within limit of value under Act of 1933—*House decontrolled and unlet at date of passing of that Act—House let after that date—Whether re-controlled by that Act—" Dwelling-house "—Act whether retrospective—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 2; *s.* 16, *sub-s.* 1—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2 (*c*).

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides: s. 2 " (1.) Subject as hereinafter provided, section two of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed " in a certain district 13*l*. Sect. 16 " (1.) In this Act . . . . ' Dwelling-house ' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling . . . . "

On July 18, 1933, the date of the passing of the Act of 1933, a dwelling-house in the district, and of the rateable value above mentioned, was occupied by the landlord, and accordingly decontrolled under the Act of 1923, and after that date it was vacated by the landlord and let to a tenant at a rent of 14*s*. 9*d*. a week :—

Held, by the Court of Appeal (Slesser L.J., du Parcq and Simonds JJ.) that the house was not re-controlled by s. 2, sub-s. 1, of the Act of 1933, for the reasons :—

First (du Parcq J. expressing no opinion on this point), that it was not a " dwelling-house " within the meaning of that sub-section, inasmuch as, not having been let as a separate dwelling at the date of the passing of the Act, it did not come within the definition of that expression in s. 16, sub-s. 1, of the Act; and

Secondly, that that sub-section had not a retrospective operation as regards a house which was decontrolled and unlet at the date of the passing of the Act, and did not re-control such a house.

In re Athlumney [1898] 2 Q. B. 547, 551, 552, observations adopted.

Stokes v. Little [1935] 1 K. B. 182, 196, observations of Slesser L.J. referred to.

APPEAL from a judgment of his honour Judge Barnard Lailey, K.C., in the Portsmouth County Court.

On and before July 31, 1923, the house, 28 Baker Street, Portsmouth, had been subject to the Rent Acts.

In 1932 a Mr. Brimecome, hereinafter called " the landlord," purchased the freehold of the house with vacant possession, the house being then decontrolled.

On April 1, 1931, the " appointed day " under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the rateable value of the house was 13*l.* a year.

On July 18, 1933, that Act was passed.

At and immediately before the last-mentioned date the landlord was the owner in occupation of the house.

In December, 1935, the landlord vacated the house, and on January 6, 1936, he let it to a Mr. Brooks, a stoker in the Royal Navy, hereinafter called " the tenant," at a rent of 14*s.* 9*d.* a week.

On October 15, 1936, the tenant took out a summons in the county court under the Rent and Mortgage Interest Restrictions Act, 1923, for the determination of the lawful or standard rent of the house. The application came before the registrar, when the preliminary objection was taken on behalf of the landlord that the house was decontrolled and therefore not subject to the Rent Acts and that the summons was accordingly inapplicable. Pursuant to a request under the Rent Restriction Rules, 1920, r. 7 (*a*), the registrar referred the application to the learned county court judge.

There had been no application for registration under s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

On November 19, 1936, the application was heard by the learned judge, who held that the house had become re-controlled by s. 2, sub-s. 1, of the Act of 1933, since by that sub-section the decontrolling section of the Act of 1923 is not to apply to " any dwelling-house of which the rateable value on the appointed day did not exceed . . . thirteen pounds "; and the relief given by sub-s. 2 only applies to a dwelling-house let as a separate dwelling immediately before the passing of the Act.

The landlord appealed.

J. Scott Henderson and *J. T. Molony* for the landlord, appellant. It appears that the respondent is unable to be present either by counsel or in person for want of means, and it is desired on behalf of the appellant to keep that circumstance in view during the argument. The county court judge was wrong in holding that the house in question, which was decontrolled at and before the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, became re-controlled by s. 2, sub-s. 1, of that Act. (1) Though that sub-section provides in terms that the decontrolling Act of 1923 shall not apply to "any dwelling-house" of which the rateable value on the appointed day did not exceed the amount there specified, it cannot properly be construed as applying to a house which, like this house, was not let at the time of the passing of the Act of 1933. That sub-section must be read along with s. 2, sub-s. 2, which makes provision whereby the landlord of a dwelling-house let as a separate dwelling immediately before the passing of the Act of 1933 can in many cases by registering the house prevent it from becoming re-controlled. The two sub-sections must be so read as to be consistent with each other, and that involves that s. 2, sub-s. 1, does not apply to a house such as this, which, immediately before the passing of the Act was not let, but was in the occupation of the landlord. It would be unreasonable and unfair to construe the provisions of the section as conferring upon a landlord who had let his house the means of preventing it from becoming re-controlled, while leaving a landlord who himself retained possession of the house without any means of preventing it from becoming re-controlled. It is true, however, as pointed out by the county court judge, that registration by an owner-occupier is not expressly prohibited by s. 2, sub-s. 2, and that a landlord has apparently in some cases obtained a benefit from registration under the sub-section: *Pearman* v. *Dyer* (2); but see *Stokes* v. *Little.* (3) It may be that a house, such as this, which was not let as a separate dwelling immediately before the passing of the Act of 1933 is not a "dwelling-house" within the meaning of s. 2, sub-s. 1,

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(1) The sections of the Acts, so far as material, are set out below in the judgments.

(2) [1935] 2 K. B. 149.

(3) [1935] 1 K. B. 182.

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of the Act of 1933, and therefore that that sub-section has no application to it, because s. 16, sub-s. 1, of that Act defines that expression for the purposes of that Act as having the same meaning as in the principal Acts, that is to say "a house let as a separate dwelling." (See Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 2.) It would seem that in a case of doubt the burden is upon the tenant of showing that a decontrolled house has become re-controlled under the Act of 1933: *White* v. *Bembridge* (1), and here the tenant has not discharged that burden. Sect. 2, sub-s. 1, of the Act of 1933 is not retrospective in operation, and does not re-control houses which have already been decontrolled before the passing of that Act: see per Slesser L.J. in *Stokes* v. *Little*. (2)

[DU PARCQ J. The Interpretation Act, 1889, provides that where an Act repeals any other Act, then, unless the contrary intention appears, the repeal shall not affect any right acquired under the enactment so repealed.]

The respondent was not represented and did not appear.

SLESSER L.J. This is a difficult case. It has been argued with great assiduity by counsel for the appellant and the Court is much obliged to him for his assistance. The Court regrets that in the circumstances it has been unable to hear the argument on behalf of the respondent, and that is a matter which it is bearing in mind.

The question which comes before the Court arose thus: The tenant of a dwelling-house made a claim in the county court under the Rent Restrictions Act, 1923, s. 11, sub-s. 1, to have his rent ascertained, a right which, of course, he only possesses if the house is what is called "a controlled house." The matter went before the Registrar. The landlord raised the preliminary question whether the house was a controlled house or not, and the registrar referred the question to the judge. The learned judge, for reasons which I shall consider, has come to the conclusion that this house is, by s. 2, sub-s. 1, of the Rent, &c., Restrictions (Amendment) Act, 1933, a house which is controlled, and that this is a case where the landlord is not able to avail himself of the provisions of s. 2, sub-s. 2, of the 1933 Act, inasmuch as immediately before the passing of this Act this house was not let as a separate dwelling.

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(1) [1935] 1 K. B. 244.

(2) [1935] 1 K. B. 182, 196.

The facts of the case, so far as they are material, as agreed and stated by the learned judge in his judgment, are these: [His Lordship stated the facts as above set out, and continued :]

It is clear, if nothing else is clear in this case, that under the Act of 1923 the house, if the conditions which are laid down in s. 2 are satisfied, became decontrolled. That section provides: " Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house." The appellant was in possession of the house at and for some time before the passing of the Act of 1933, having come into possession of it at some time in 1932, so that at the passing of the Act of 1933 and since 1932 the principal Act had ceased to apply to the dwelling-house. In these circumstances, it is said that, although certainly this house was not controlled from 1932 to the passing of the Act of 1933, yet by reason of the operation of s. 2 of the 1933 Act this house once more became controlled and that that control had a retrospective operation. The language of s. 2, sub-s. 1, of the Act of 1933 is this: " Subject as hereinafter provided, section two of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed . . . . 13*l*."; which is this case. As I understand it the case put against the landlord is that no sooner did this section become law on July 18, 1933, than whatever benefits the landlord had obtained under s. 2 of the earlier Act of 1923 ceased to apply, and that this house, being a house of which the rateable value did not exceed 13*l*., became once more, and should be deemed to have been all along, a controlled house. Sub-s. 2 of s. 2, which mitigates in appropriate cases the severity of that provision, says: "If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in the last foregoing subsection, claims that by virtue of the provisions of the said s. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house, and if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said s. 2 of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house, shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply." There is a further provision, with which we are not concerned here, to the effect that if there is delay in registration the Court may certify there was a reasonable excuse, and that provision fixes the date from which the Act will apply to the house. That provision does not apply here, although it has been discussed in certain cases. It may be the Act would not apply to a dwelling-house if there had been that postponed registration.

It is said in this case, as I understand it, that, assuming that s. 2, sub-s. 1, of the Act of 1933 is applicable retrospectively to houses decontrolled at the passing of that Act on July 18, 1933, this house was no longer within s. 2 of the Act of 1923 even though the landlord had come into possession of the whole of the house, and that, consequently, the house was again controlled; and, further, that, as the landlord did not let the house as a separate dwelling immediately before the passing of the Act of 1933, he cannot take advantage of the provisions of s. 2, sub-s. 2, of that Act dealing with registration. These seem to have been the views which actuated the learned county court judge in coming to his conclusion in this case. I have, however, come to the conclusion that the learned judge was wrong in the view he formed, and for the following reasons: It would appear, certainly upon the face of it, to be a considerable injustice, assuming that s. 2, sub-s. 1, has a retrospective operation, that on the passing of the Act of 1933 the position of decontrol which obtained under the Act of 1923, when the landlord came into possession, would be destroyed in the case of every landlord, while sub-s. 2, which enables a landlord largely to obviate these difficulties arising from re-control by obtaining appropriate registration applies only to a landlord who has let his house and not to a landlord who, like the appellant, has not done so. Further, the view which the learned judge has taken appears to me erroneous because of his having omitted to take into consideration the definition of the expression dwelling-house contained in the Act of 1933. There is a difficulty, I agree, in applying this definition to the provisions of some of the earlier Acts, but it appears to me to be a definition rightly to be applied, at any rate, to the particular Act which we have here to consider. The definition is contained in s. 16 of the 1933 Act and is as follows: " 'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let." This definition is very difficult to construe, because if "dwelling-house" here meant something other than that stated in the principal Acts, it would appear that the definition contained in the principal Acts has been modified by this definition, and might have to be applied in cases where it would be extraordinarily difficult to apply it, and where the Act has perhaps been construed on the basis of a different definition. Thus, in s. 12 of the 1920 Act there is a definition, or at least a provision operating as a definition which, on the face of it, is in slightly different language, and difficulties might arise in construing that definition. Apparently Sargant J. in *Woodifield* v. *Bond* (1) took one view as to whether the provision is to apply to the whole house or only to a part, and other learned judges took a different view. Difficulties may arise in applying the definition in s. 16 of the 1933 Act to certain cases. For example, s. 2 of the 1923 Act speaks of the landlord of a dwelling-house to which the principal Act applies being in possession of the whole of the dwelling-house, whereas s. 16 of the 1933 Act seems to say that a dwelling-house means a house let as a separate dwelling or a part of a house so let. I do not, however, think that it is necessary for the present purpose to decide whether and how far the definition of a dwelling-house in the 1933 Act does or does not modify the definitions in earlier Acts. It is sufficient for this purpose to point out that in this particular Act of 1933 the word " dwelling-house " is used as there defined ; that s. 1, sub-s. 2, says that as from a certain date " the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act, ... and it is also a dwelling-house " of which the rent is a certain amount ; and that it is provided by s. 2, sub-s. 1, that " Section 2 of the Act of 1923 . . . . shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed " a certain amount. Now " dwelling-house " there means a house let as a separate dwelling, and in this case it appears to me that this house not being let as a separate dwelling, it cannot be said that s. 2 of the 1933 Act deals at all with the class of house which we have here to consider. If s. 2, sub-s. 1, of the 1933 Act is to be read, as I think it should be read, and " dwelling-house " there means a house let as a separate dwelling or part of a house being a part so let, it follows that the exclusion or exemption from control of his dwelling-house which the landlord had obtained under the 1923 Act is not that which is referred to in s. 2 of the 1933 Act at all, because his house at the time of the passing of that Act was not a house let as a separate dwelling. If I am right in thinking that s. 2, sub-s. 1, applies only to a house which is let, and has no application to a house which is not let, then s. 2, sub-s. 2, which deals with the case of a landlord of any dwelling-house let as a separate dwelling who wishes to register or must register, becomes a perfectly consistent provision. According to that view, sub-s. 1 of s. 2 of the 1933 Act is only dealing with dwelling-houses which are let as separate dwellings or a part of a house being a part so let, and sub-s. 2 is the machinery to cover the whole subject-matter of sub-s. 1. Both of the sub-sections are dealing with a house let as a separate dwelling or in part as such, and the supposed inconsistency of leaving the landlord of a house which is not let without any remedy when he finds himself controlled by s. 2 does not exist. For that reason, which I am conscious is not a reason which the learned judge has considered, I think that this appeal ought to be allowed. The basis of my decision is that this house was decontrolled under the 1923 Act, s. 2, and has not become re-controlled (either retrospectively or prospectively) under the 1933 Act, s. 2, because it was not a house which was let at the time of the passing of that Act.

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(1) [1921] W. N. 309.

There is, of course, a further, and to my mind, a more difficult, question, which is rather the question dealt with by the learned judge, namely, whether in any view of this matter s. 2, sub-s. 1, of this Act has a retrospective operation, or, in other words, whether the true view is not that between the time when the decontrol started in 1923, or whatever time the landlord came into possession, and July 18, 1933, when the Act of 1933 was passed, the landlord during that period was entitled to the benefits of the earlier Act, and the house for all purposes ought to be decontrolled. This, I think, was a question not falling to be decided in *Stokes* v. *Little* (1), in which, speaking for myself, I said that I would wish to reserve consideration. The question which was particularly occupying my mind then was the position of third parties who had purchased a private interest in houses between 1923 and 1933 on the assumption that they were decontrolled, and, of course, of considerably greater value, finding out afterwards that by an

(1) [1935] 1 K. B. 182.

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operation of the law they had purchased something other than that which in good faith they thought they had purchased, and, of course, there are other considerations which may have to be kept in view.

The general principle determining the effect of a repealing Act is clearly laid down in the Interpretation Act, 1889. By s. 38, sub-s. 2 (*c*), of that Act it is provided that: "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." Here clearly, to my mind, the landlord has acquired a privilege, which no doubt he is possessed of in common law, of letting this house at such rent as he thinks fit. I think it would be a right approach to the problem to say that we are required by the Interpretation Act—if not, on the common law principle that no one can have his right taken away without compensation—to start with the presumption that this landlord, having recovered his common law right to dispose of the property, unless there is clear language to the contrary, before July 18, 1933, was still left free, and the Act has not a retrospective operation. It has been argued, and I think the argument found favour with the learned judge, that under the principal Act this house was decontrolled only in so far as this: that s. 2 of the 1933 Act, although the house is excluded from control, can apply to it if at any time it falls into the category to be controlled, as appears from the principal Act, and that the words in the 1933 Act, s. 2, sub-s. 1: "Subject as hereinafter provided section two of the Act of 1923 . . . . shall not apply to any dwelling-houses," do deprive the landlord of the benefit of s. 2 of the Act of 1923 and throw him back into the position in which he was before 1923. Having given the matter my best consideration I have come to the conclusion, though not without some hesitation, that the language here used is not sufficiently strong to override the general assumptions which arise under the Interpretation Act and under the common law. I think that stronger language would be necessary to enable one to say that this wording has a retrospective operation. It is the same consideration which caused me to pause in the case of *Stokes* v. *Little* (1), and now that the matter has come up to be dealt with I do not think that the language of the sub-section is retrospective. I think that properly the sub-section can only be deemed to operate as and from July 18, 1933, and that if a landlord's house was decontrolled before that time between the 1923 Act, or the time when the landlord came into possession, and this Act, it would continue so to be decontrolled, and that this Act has not a retrospective operation.

For these reasons, one of which is contrary to the opinion of the learned judge and the other of which he has not dealt with, I have come to the conclusion, first, that this is not a dwelling-house falling within s. 2 of the 1933 Act, though it does appear to be a dwelling-house falling within s. 2 of the 1923 Act for the purpose of the landlord maintaining the exclusion; and, secondly, that s. 2 of the 1933 Act is not retrospective in its operation. I am of the opinion that this appeal should be allowed.

DU PARCQ J. I have come to the same conclusion. In this difficult case I prefer to found my judgment on the second of the two grounds suggested by my Lord. Nothing is clearer than that the Courts ought to be slow to give a retrospective operation to a statute so as to disturb existing rights or obligations. There is a very well known passage to that effect in the case of *In re Athlumney*. (2) That passage is cited in Maxwell on the Interpretation of Statutes, 7th ed. at p. 186, and I will read the whole of the citation: "No rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as

(1) [1935] 1 K. B. 182.

(2) [1898] 2 Q. B. 547, 551, 552.

prospective only." My Lord has pointed out already that in his judgment in the case of *Stokes* v. *Little* (1) the question whether the section now under consideration is to be regarded as retrospective or not was expressly left open. I am impressed, necessarily, by the fact that Lord Wright in his judgment in that case does appear to have taken the view that the section had a retrospective effect, but his observation was a dictum not binding on the Courts. Finding the question left open I am bound to come to the best conclusion I can upon it, and on consideration I am of the opinion that the language of this enactment is fairly capable of either interpretation.

To deal briefly with the relevant sections. Sect. 2 of the 1933 Act contains these words: "Subject as hereinafter provided, s. 2 of the 1923 Act (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed," and then come the words which bring in the house in Portsmouth with which we are now concerned. When one looks back at section two of the Act of 1923 one finds that it refers to cases in which the landlord of a dwelling-house to which the principal Act applies is in possession of the dwelling-house. When he has become the owner-occupier under that 1923 Act the Rent Restrictions Acts no longer are to apply to the dwelling-house. If s. 2 of the 1933 Act has a retrospective effect, it means, of course, that the appellant in this case is now brought within the Act of 1933, but if it is not given a retrospective effect it appears to me to be easy to give a reasonable interpretation to the whole of the section. The section seems to me to be contemplating several different cases, first, that in which the owner-occupier at some time came into possession and has remained in possession; secondly, the case in which the owner was at one time in possession and ceased to be in possession and has let his house; and thirdly, the case in which the owner is not in possession and the house is let, but at some future time may be occupied by the owner. Treating s. 2 as not being retrospective I think the position with regard to the owner whose house is at present let is that if in future he becomes the owner-occupier of it, the house will not thereby become decontrolled, because for the future s. 2 of the 1923 Act is not to apply to houses which come within that exception. So far as the owner who is in occupation of his house at the time of the passing of the Act is concerned he is perfectly safe, for his house is decontrolled and always will be decontrolled. But so far as the owner is concerned who at some time in the past obtained possession of the house so that it was decontrolled, but thereafter let it, he is put by the Act into this position: he would be entitled, but for s. 2, sub-s. 2, to say that his house is decontrolled, because, if I am right, sub-s. 1 is not retrospective, but he is told by that sub-s. 2 that unless he takes certain steps for the registration of his house it will be deemed to be a dwelling-house to which the principal Acts apply, and he is therefore under the necessity of taking steps to obtain the registration which is provided for in that sub-section. If he does that, then the house will be a decontrolled house, but if he does not do that the house will be deemed to be a dwelling-house to which the principal Acts apply.

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(1) [1935] 1 K. B. 182.

In my view the interpretation which refuses to give a retrospective effect to s. 2, sub-s. 1, is no less consistent with the provisions of this Act than the other suggested interpretation which has found favour with the learned county court judge. If s. 2, sub-s. 1, is indeed retrospective in its operation, then there is not a threat that anything will happen which has not happened already when the landlord is told by s. 2, sub-s. 2, that in certain events the house will be deemed to be a dwelling-house to which the principal Acts apply, because by sub-s. 2 it is already a dwelling-house to which the principal Acts apply. For these reasons it seems to me that the construction I have been persuaded to put upon the Act is a possible and a fair construction, and it certainly does avoid the result which the learned judge has himself found unsatisfactory and difficult to support. I agree, of course, with the view which the learned judge has expressed in his judgment, that it is not for the Courts to inquire what the motive of the Legislature may have been; but where one finds a perfectly possible construction of an enactment leading to a reasonable conclusion, and another construction which leads to a conclusion which strikes everybody as unreasonable, there is no reason why the Court should not lean, and indeed I think the Court is bound to lean, to the former of these two constructions. I think, therefore, that these words in s. 2, sub-s. 2, which appeared difficult to the learned judge, namely, "let as a separate dwelling," are really words intended for the protection of the landlord who has not only resumed possession of his house but is in fact occupying it. That, I take it, is the purpose of those words.

I agree, if I may say so, with my Lord that the judgment of the learned county court judge and the arguments of counsel have assisted us in this case, and seeing the care expended upon it by the learned judge I feel some satisfaction in the thought that our decision to-day is obviously, from what he says, likely to afford him some gratification.

SIMONDS J. I agree and have only one observation to add. It seems to me that it is necessary to deal with one question upon which the first judgment was given, the question, namely, as to the meaning of the words in s. 2, sub-s. 1, of the 1933 Act. This dwelling-house having been decontrolled under s. 2 of the 1923 Act, fell to be re-controlled under the 1933 Act if, and only if, it was a dwelling-house within the meaning of s. 2, sub-s. 1, of the 1933 Act. Now the 1933 Act defines a dwelling-house as "a house let as a separate dwelling," and that must mean, in my view, a house which is so let at July 18, 1933, the date on which the Act came into force. Therefore, in order to know whether any particular house is a dwelling-house within the meaning of the sub-section one has to ask whether it can be treated as being so let at that date. If it is so let then it is a dwelling-house within the meaning of the Act; if it is not so let then it is not a dwelling-house within the meaning of the Act. It appears to me that the first ground upon which my Lord gave his judgment in this case, namely, that this house not having been let as a separate dwelling when the Act came into force was not a dwelling-house within the meaning of the

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Act, is the correct ground. The house being one which has been decontrolled before the passing of the Act of 1933 and which has never been brought into re-control by the operative words of the 1933 Act remains uncontrolled.

In regard to the retrospective operation of the Act, I have nothing further to add to what my Lord has said.

Appeal allowed.

Solicitors for appellant: *Gibson & Weldon, for Hobson Thomas, Sherwell & Wells, Portsmouth.*

Solicitors for respondent: *G. H. King & Franckeiss, Portsmouth.*

J. R.

Considered. LAWSON *v.* ODHAMS PRESS, LTD. [1948] 2 All E.R. 717.

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April 20, 21;
May 31.

SOUTH SUBURBAN CO-OPERATIVE SOCIETY, LIMITED *v.* ORUM AND OTHERS.

Defamation—Libel—Letter to newspaper—Action against writer of letter and against newspaper—Defence of fair comment—Interrogatories by plaintiff to writer defendant as to identity of his informants—Relevancy—Objection to answer—Privilege of newspaper whether available to writer defendant.

Where, to an action for libel in respect of a letter published in a newspaper there are pleas that the letter is fair comment made in good faith and without malice on a matter of public interest, an issue being thus raised as to the attitude of mind of the defendant at the time when the letter was published, the special rule of practice which in such a case exempts a defendant who is the proprietor or the publisher of the newspaper from disclosing the name of a person who supplied information contained in the letter notwithstanding that such information is otherwise relevant to that issue, does not extend to protect a defendant who is the writer or contributor of the letter from disclosing the names of his informants.

White & Co. v. *Credit Reform Association and Credit Index, Ld.* [1905] 1 K. B. 653 applied.

Lyle-Samuel v. *Odhams, Ld.* [1920] 1 K. B. 135 principles applied.

Hennessy v. *Wright (No.* 2) (1888) 24 Q. B. D. 445*n.* and *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* [1906] 1 K. B. 403 not applied.

APPEAL from an order of Lewis J.

The South Suburban Co-operative Society, Ld. (hereinafter called "the plaintiffs") were a co-operative society trading and registered under the Provident Societies Act, 1893, and carried on business as universal providers on the southern side of London. They were closely associated with the co-operative and trade union movements, and most of their business was done with working-class members and customers who were associated with these movements or in sympathy with the principles thereof.

Mr. B. Orum, the first defendant, was the area secretary of the National Amalgamated Furnishing Trade Association, Croydon; and the Croydon Advertiser, Ld., the second defendants, were the printers and publishers of a newspaper known as the

Beckenham and Penge Advertiser, which had an extensive circulation in the area supplied by the plaintiffs.

On February 6, 1936, there appeared in this newspaper the following letter written by the first defendant :—

" Co-operative Society and Furnishing Trades.

" To the Editor of the Beckenham and Penge Advertiser.

" Sir,—It was with keen interest that I read the sixty ninth report of the South Suburban Co-operative Society in your valuable paper. On the face of things this makes co-operators proud of the movement. But had the management board disclosed under what conditions a vast bulk of the furniture in their stores is produced, the co-operators present would not have been in such a joyous mood. To be frank, why has the management board not thought it fit to disclose that for a long time numerous trade unions and trade councils have complained to the management board that a large percentage of furniture sold at their stores are produced under conditions no trade union affiliated to the trade union congress will tolerate. Complaints are made that the South Suburban Co-op. are trading with what are known as ' rat shops.' It would also have been interesting if the management had made a public statement why the evidence of trade union officials representing six unions was not believed. Mr. Harry C. Jones asks for true co-operators. My answer to him is that true co-operators are walking the streets while they see their stores supplied with ' black furniture ' under conditions which are such that No trade unionist need apply. (Signed) B. Orum."

On March 6, 1936, the plaintiffs brought the present action against the first and second defendants, claiming damages for libel and an injunction.

The plaintiffs in their statement of claim alleged (inter alia) (para. 4) that the words of the letter meant and were intended and understood to mean that the plaintiffs were dishonestly professing loyalty to trades union and/or co-operative principles and were traitors to the principles which they professed ; that they were deliberately and habitually supplying furniture a vast bulk and/or large percentage of which was to their knowledge produced by sweated labour and/or under working conditions which were improper and unfair and/or repugnant to the interests and principles of the trades union and/or co-operative movements; that the plaintiffs had been and were guilty of conniving at such conditions; that the plaintiffs' conduct of their said business was such as to cause or contribute to unemployment amongst fellow co-operators and trades unionists and/or amongst members of the plaintiff society and/or amongst customers of the plaintiffs' business and was such that no person in sympathy with the trade union or co-operative movement ought to be or remain a member of the plaintiff society or ought to do business with it; and that the plaintiffs deliberately and dishonestly refused to give fair consideration to complaints by members and/or trade union officials, and were guilty of dishonestly concealing facts which if known would and ought to cause the plaintiff society and its business to be shunned; and (para. 5) that by reason of the premises the plaintiffs had been injured in their credit and reputation, and had been held up to public hatred ridicule and contempt, and had suffered damage; and that the plaintiffs claimed (*a*) damages, and (*b*) an injunction restraining the defendants and each of them their servants or agents from further publishing the said or any similar libels.

The first defendant in his defence alleged (para. 3) that the words contained in the letter were true in substance and in fact; (para. 4) that the words were fair comment made in good faith and without malice upon a matter of public interest, namely the relationship of the plaintiffs to the trade union movement, and whether they were entitled to the support of members of and sympathizers with that movement in the district served by the said newspaper; (para. 5) that the defendant denied the innuendoes alleged in para. 4 of the statement of claim, and said that the words did not mean and were not understood to mean that which was there alleged; (para. 6) that in the alternative if the words bore the innuendoes alleged or any of them the words with such innuendoes were true in substance and in fact; and (para. 7) that the defendant denied that the plaintiffs had suffered damage as alleged or at all.

The second defendants delivered a defence substantially to the same effect.

The plaintiffs sought to administer the following interrogatories (inter alia) to the defendants :—

" 2. What information if any had you and from whom before writing and/or printing and/or publishing and/or causing to be published the words set out in para. 3 of the statement of claim : and what steps and/or precautions if any did you take, and what enquiries if any did you make, before writing and/or publishing the said words and/or causing the same to be published, to verify the same and/or to ascertain whether they were true or not ?

" 3. When where and of whom were such enquiries made ? Was/were such information and/or such enquiries oral or in writing ? If oral state the substance thereof, and if writing, identifying the documents."

The Master disallowed the words " and from whom " at the beginning of interrogatory 2, and the whole of interrogatory 3.

Lewis J., on an appeal by the plaintiffs, made an order varying the order of the Master, and directing that interrogatories 2 and 3 as originally drawn should be administered to the defendant Orum in addition to the other interrogatories.

The defendant Orum appealed.

Gilbert J. Paull for the defendant Orum, appellant. Lewis J. was wrong in requiring the defendant Orum to answer interrogatories 2 and 3 in so far as they asked him to disclose the names of the person or persons from whom he received the information contained in the letter in respect of which the action is brought. It is not disputed on behalf of the defendant that, in the absence of any special rule to the contrary, in an action for defamation in which, as here, an issue is raised as to the attitude of mind of the defendant at the time when the statement complained of was published, the names of the defendant's informants would be relevant to that issue and such interrogatories as these would therefore be admissible. There is, however, a special rule to the contrary. It is well established that, where the alleged defamatory statement has been published in a newspaper, and the action is brought against the proprietor or publisher of the newspaper, the defendant will not be ordered to disclose the names of the person contributing the statement or supplying the information contained in the statement. Thus, in *Hennessy* v. *Wright* (*No.* 2) (1), where the action was against the publisher of a newspaper in respect of an article published therein and there was a defence of fair comment, the Court refused to order the defendant to disclose the names of the persons from whom the information in the article was obtained. In that case the Court disallowed the discovery not because the defendant was the publisher of a newspaper but on the much wider ground that the discovery was not there relevant to the issue; but certain observations of Lindley L.J. (2) in that case are said to constitute the first mention of the rule that in every such case where the defendant is the publisher of a newspaper discovery of the names of his informants should be refused. That case was followed by *Hope* v. *Brash* (3), where in an action against the proprietor of a newspaper for a libellous article therein, discovery was disallowed of the original manuscript of the article. The ground of that decision also would appear to have been that the discovery was not relevant; but A. L. Smith L.J. there observed (4) that it had been the ordinary rule of practice, as laid down by Lindley L.J., that in such a case an order would not be made for discovery of the name of the writer of an article published in a newspaper. These two cases, though based essentially upon the ground that the discovery sought for was not relevant, are commonly regarded as the foundation of a special rule exempting newspaper defendants from making such discovery. In *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* (5), where the action was against the publishers of a trade journal in respect of an article therein to which the defendants pleaded that the article was fair comment made in good faith without malice, an interrogatory asking

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(1) (1888) 24 Q. B. D. 445*n*.
(2) Ibid. 449.
(3) [1897] 2 Q. B. 188.
(4) Ibid. 192.
(5) [1906] 1 K. B. 403.

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the defendants from whom they obtained the information on which they relied in publishing the article was held inadmissible. In that case Vaughan Williams L.J. said (1) that the question was whether there were any special circumstances in the case which would justify a departure from " the general rule of practice as to not compelling the disclosure of the names of the persons who supplied the information on which the alleged libel was based in cases of this kind, where the proprietors of a newspaper or other periodical publication set up a defence such as is here pleaded," and added that he did not find any such circumstances. What may be called the newspaper rule is there explicitly stated for the first time. *Adam* v. *Fisher* (2) was not an action against a newspaper defendant; but Buckley L.J. there suggested, as a reason why newspaper defendants had been treated differently from other defendants, that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed. In *Lyle-Samuel* v. *Odhams, Ld.* (3), where the action was against the proprietors and publishers of a newspaper in respect of matter consisting of an attack on the private character of the plaintiff, to which the defendants pleaded fair comment, it was held on the authority of the *Plymouth* case (4), that in the absence of special circumstances the defendants could not under the general rule of practice be compelled to give the names of their informants. It is true that hitherto almost all the cases in which the special rule of exemption has been applied have been actions against the proprietors or publishers of newspapers. In no case, however, has it been laid down that the rule is restricted to such defendants. On the contrary, there are observations in the judgments in *Hope* v. *Brash* (5), the *Plymouth* case (4), and other cases which seem to show that the rule would extend to all persons who in any way assist in the publication of the statement in the newspaper, such as an editor, reporter or agent, and among others the author or contributor of the published statement, and would

(1) [1906] 1 K. B. 415.
(2) (1914) 110 L. T. 637; 30 Times L. R. 288.
(3) [1920] 1 K. B. 135.
(4) [1906] 1 K. B. 403.
(5) [1897] 2 Q. B. 188.

protect any of these persons from disclosing the names of his informants. There is no difference in principle, for this purpose, between the publisher of the newspaper and any of these other persons. Unless the rule extends to these other persons, it would be easy for a plaintiff to circumvent it by suing and interrogating one or other of these persons. The term "newspaper" is defined in the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1, and in the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 1, and according to the definition there given a paper is a "newspaper" which contains public news and is published periodically at intervals not exceeding twenty-six days: see Gatley on the Law and Practice of Libel and Slander in Civil Actions, 2nd ed., pp. 353, 354. It would seem that the rule of exemption is not even limited to cases connected with newspapers. In the *Plymouth* case (1) Vaughan Williams L.J. seems to have thought that in matters interesting to a number of the public disclosure of the sources of information should not in any case be ordered. In *Adam* v. *Fisher* (2) the defendant was not the proprietor nor the publisher of a newspaper, the statement complained of not having been published in a newspaper, yet the Court disallowed interrogatories as to the sources of the defendant's information. It is submitted that the ground of the rule there stated is the true ground—namely, that where the alleged libellous statement is of importance or interest to a large number of persons it is a matter of public policy that the names of the defendant's informants should not be disclosed. The rule is sufficiently wide to protect the defendant Orum from answering these interrogatories, and thus disclosing the names of his informants.

Gordon Alchin for the plaintiffs, respondents. Lewis J. rightly ordered the defendant Orum to answer interrogatories 2 and 3. The general principle, as the defendant admits, is that in an action for defamation, in which, as in the present case, there is an issue as to the attitude of mind of the defendant at the time when the alleged defamatory statement was published, the sources of information of the defendant, including the names of his informants, are relevant to that issue and ought therefore to be disclosed: see per Collins M.R. in *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1); and per Bankes and Scrutton L.JJ. in *Lyle-Samuel* v. *Odhams, Ld.* (2); and see *Elliott* v. *Garrett.* (3)

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(1) [1906] 1 K. B. 403, 416.

(2) 30 Times L. R. 288.

[GREER L.J. referred to Halsbury's Laws of England, 2nd ed., vol. 20, p. 500.]

It is true that in several cases in which an action for libel has been brought against the proprietor or the publisher of a newspaper and there has been a plea of fair comment or privilege raising an issue as to the intention of the defendant at the time when the statement complained of was published, the Court has refused to order disclosure of the names of the defendant's informants: as, for example, in *Hennessy* v. *Wright* (*No.* 2) (4); *Hope* v. *Brash* (5); *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* (6); and *Lyle-Samuel* v. *Odhams, Ld.* (7). It is said on behalf of the defendant Orum that these cases establish an exception to the general principle of relevancy and lay down a rule of practice that in no such case will the defendant be required to disclose the names of his informants. It is not easy to extract a fixed rule from these cases. In *Hennessy* v. *Wright* (*No.* 2) (4) Lindley L.J. said (8) that, while he appreciated the reasons for the practice, perhaps he would not have given effect to them in the first instance; in *Hope* v. *Brash* (5) A. L. Smith L.J. was careful to observe (9) that he did not say that the rule was one which could never be departed from; in the *Plymouth* case (6) Vaughan Williams L.J. recognized (10) that the rule might be departed from in special circumstances; and in the *Lyle-Samuel* case (7) Scrutton L.J. said (11) that it seemed to him that on principle there would be a great deal to be said for allowing the name

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(1) [1905] 1 K. B. 653, 658, 659.
(2) [1920] 1 K. B. 135, 140, 143.
(3) [1902] 1 K. B. 870.
(4) 24 Q. B. D. 445*n*.
(5) [1897] 2 Q. B. 188.
(6) [1906] 1 K. B. 403.
(7) [1920] 1 K. B. 135.
(8) 24 Q. B. D. 449.
(9) [1897] 2 Q. B. 192.
(10) [1906] 1 K. B. 415.
(11) [1920] 1 K. B. 143.

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of the informant to be asked in such a case. Assuming, however, that there is such a rule of exemption, it is confined to cases in which the defendant is the proprietor or publisher of a newspaper, and does not extend to a case in which the defendant is any of the other persons who may contribute to the publication of the article in the newspaper, such as the writer of the article, so as to exempt that other person from disclosing the names of his informants. In all the reported cases of this kind in respect of an article published in a newspaper, the defendant has been either the proprietor or the publisher of the newspaper, and in no such case has the defendant been the writer or contributor of the article. To apply the rule in a case of the latter description, such as the present, would lead to anomalous results by enabling a man who desired to publish a libel without incurring the risk of disclosing his informers to do so by publishing it in a newspaper. Still less ground is there for saying that the rule extends to all cases in which the statement complained of, whether published in a newspaper or elsewhere, is of interest or importance to a considerable number of the public. The dicta in the *Plymouth* case (1) and in *Adam* v. *Fisher* (2) are not sufficient to support that contention. Though the editor of a newspaper may pass an article for publication, it does not follow that it is an article of genuine public interest whose sources cannot be inquired into, because an editor may mistake the sensational appeal of an article for public interest. The fact that in such cases it is possible to find some exceptions from the general principle of relevancy, as, for example, in the case of a defendant who is the publisher of a newspaper, does not prevent that principle from applying in any other case. In the present case it may be of vital importance that the defendant should answer these interrogatories and say who gave him the information contained in the letter which he published.

S. H. Noakes for the Croydon Advertiser, Ld.

Paull in reply. It is said that as the writer of a libellous statement who published it elsewhere than in a newspaper

(1) [1906] 1 K. B. 403, 416. (2) 30 Times L. R. 288.

would not be protected from disclosing the names of his informants, he ought not to be enabled to protect himself by publishing the statement in a newspaper; but that argument cannot be regarded as sound in view of the fact that the publisher of a newspaper would not be protected if he published the statement elsewhere than in the newspaper but is protected if he publishes it there.

Cur. adv. vult.

1937. May 31. GREER L.J. I have written a short judgment myself expressing my view that this appeal should be dismissed with costs and the reasons for it; but since then I have had the opportunity of reading Scott L.J.'s judgment and, as he enters further into the authorities on the question, I have thought it right to save the time of the reporters by saying that Scott L.J.'s judgment shall be taken to be the judgment of the Court.

I have the authority of Finlay J. for saying that he agrees with the result at which I have arrived.

SCOTT L.J. In the present action the South Suburban Co-operative Society, Ld., claims damages and an injunction in respect of an alleged libel contained in a letter signed by the defendant Orum which was published in the defendant company's newspaper of February 6, 1936. The letter is set out in extenso in para. 3 of the statement of claim and a long and detailed defamatory innuendo is pleaded in para. 4.

The appeal raises the question—often considered incidentally but not actually decided in its simplest form—whether on a defence of fair comment a defendant, who is not sued as the owner or publisher of a newspaper but in his individual capacity as the author of a defamatory publication in the newspaper, can properly be interrogated, not only as to the information he had when he wrote the alleged libel and as to what precautions he took to verify his information, but also as to the identity of his informants.

In the case of a newspaper this Court has repeatedly held that there is an old rule of practice according to which discovery of the names of the paper's informants ought not to be enforced, at any rate in the absence of special circumstances—a phrase which has not been explored very much judicially.

There is no question before us which affects the defendant newspaper; the sole appellant is the individual defendant, Orum; and the real question that we have to decide is whether the well established rule of practice to which I have referred is a privilege limited to newspaper defendants, or is applicable also to an individual defendant signing a letter published in a newspaper.

The Master gave the appellant the benefit of the rule and struck out those parts of the interrogatories which asked for the names of the appellant's informants. Lewis J. reversed the Master and ordered the appellant to answer. The appeal is from that decision.

I have no doubt that we should dismiss the appeal. To do otherwise would, in my view, be inconsistent with carefully reasoned expressions of opinion in the Court of Appeal, the principles of which we ought to apply even if they were not the actual grounds of decision. In addition I respectfully agree with those opinions. The question raised is one of considerable importance in practice and, as the case has been well argued by both sides on first principles, it is desirable to analyse the considerations on which, in my judgment, our decision depends.

The fundamental feature of the present case is that the subject-matter of the interrogatories which the defendant was ordered by the learned judge to answer is, on the one hand, within the scope of relevancy for the purpose of discovery as defined by Lord Esher in *Marriott* v. *Chamberlain* (1), and, on the other hand, is not within the exceptional immunity from such discovery conferred upon newspaper defendants by the special rule of practice, followed for more than half a century and explicitly recognized and enforced by the Court of Appeal as long ago as 1888 in the case of *Hennessy* v. *Wright* (*No.* 2). (2)

In the ordinary case of a libellous statement made upon the faith of information gathered from third parties, it is

(1) (1886) 17 Q. B. D. 154, 160. (2) 24 Q. B. D. 445*n*.

relevant to the issue of malice raised by a plea of fair comment for the jury to know, not only what the information was, but also any facts affecting the propriety of the defendant's action in accepting the information at its face value to the extent of making a defamatory statement about the plaintiff upon the credit of it. The whole of the circumstances in which the defendant obtained the information are or may be relevant; and of these circumstances not the least relevant will be the position, standing, character and opportunities of knowledge of the particular person upon whom the defendant says he relied for his information. If the defendant is in a position to give those particulars about his informants, the plaintiff is entitled to know them in order that he may criticize the defendant's conduct and also in order that he may make his own inquiries about the persons named, with a view to attacking the defendant's alleged reliance upon the information so received. If the defendant is not in a position to say from whom he got his information, this admission may in itself be a valuable piece of evidence for the plaintiff.

That information about the identity of a defendant's informants falls within the general field of relevance on the issue of malice seems to me to be self-evident, although I realize that there are expressions in the cases before 1905 which seem to throw doubt upon that view; but in that year there was an important decision in the Court of Appeal in the case of *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (1), and whatever doubts may have been raised by the earlier cases on the general question of relevance are set at rest by the judgments in that case. It was an action of libel by a trader against a Trade Protection Society, the libel being upon the plaintiff's financial position and the publication having been made to subscribers to the defendants' "Credit Index," a card index system of circulating information in a confidential form about the financial position of particular traders. Privilege was pleaded and on the issue of malice the following interrogatory was proposed by the

(1) [1905] 1 K. B. 653.

plaintiff: "Did the defendants before publishing the said credit index and key card take any and what precautions, or make any and what inquiries as to the truth of the said particulars"—i.e., the statements complained of—"or make any and what inquiry at all with respect to such particulars? From whom did the defendants obtain the information on which they relied in making the statements complained of?" Sir R. Henn Collins M.R. said (1): "Therefore, it is clear that, the question being as to the condition of mind of the person publishing the defamatory statement, the amount of information upon which he acted, and the means taken by him to ascertain the truth of that statement, are legitimate subjects for interrogation. If so, why should one stop there? The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statements published, but to whom such inquiry was addressed. If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. To sever the question from whom such information was obtained from the question whether any and what information was obtained appears to me quite illogical. I can see no principle on which, or reason why, such a severance should be made." Mathew L.J. said (2): "I do not see any reason in this case for thinking that the first interrogatory is put for any other than a legitimate purpose, namely, to rebut the defence of privilege by shewing that the information upon which the defendants published the statements complained of was such that no person could reasonably be supposed to have acted bona fide upon it. It is obvious that the best test of the value of information would be the character and position of the persons from whom it was obtained. I have nothing further to add to what the Master of the Rolls has said on this subject." There can be no question that in that case there was a definite decision of this Court that the identity of the defendant's informant is for purposes of discovery relevant in such an action as the present.

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(1) [1905] 1 K. B. 653, 658. (2) Ibid. 653, 660.

What I have called the special newspaper immunity does not rest on any independent principle of law, but is in truth an exception, the grounds of which have not been very completely defined, carved out of the general field of relevance, of which the judgments I have just cited give a clear picture.

The nature of this newspaper immunity was discussed to some extent in 1906 in the case of *Plymouth Mutual Co-operative and Industrial Society, Ld.* v. *Traders' Publishing Association, Ld.* (1) Vaughan Williams L.J. treated it (2) as "a general rule of practice" to the effect that a newspaper should not be called upon to disclose the name of its informants on the issue raised by a plea of privilege or fair comment.

A much fuller discussion upon this "rule of practice" took place in 1920 in the case of *Lyle-Samuel* v. *Odhams, Ld., and Others* (3), where the plaintiff sued the defendants as publishers of a paper called the National News for a libel upon his private character published when he was a candidate for Parliament. The defendants pleaded justification and fair comment. Interrogatories as to who the defendants' informants had been were disallowed by the Master and by Roche J. Bankes L.J. (4) recognized that the interrogatories were within the general field of relevance and referred to the principle of their relevance as "the general rule," whilst adding "it is also well established, at any rate so far as this Court is concerned, that there is an exception to that rule in the case of newspapers." The learned Lord Justice made some observations upon the possible reasons for the exception and seemed at one point inclined to doubt whether it ought to be limited to newspapers, but ended by saying (5): "All I say is that this is an action of libel against the publishers of

(1) [1906] 1 K. B. 403.

(2) Ibid. 415.

(3) [1920] 1 K. B. 135.

(4) Ibid. 140.

(5) Ibid. 143.

a newspaper, that it is well established that in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment." Scrutton L.J. discussed both the general scope of relevance in such cases and the exceptional newspaper immunity. After pointing out that the information acquired by the defendants before publishing their libel might be obviously relevant on the issue of malice, he added (1): "If one approached the question unfettered by authority, it seems to me that on principle there would be a great deal to be said for allowing the name of the informant to be asked in a case like the present. It seems to me that in questions of malice it would ordinarily be relevant to ask, not only what the defendant knew when he published the libel, but also who told him. The informant may be a person who has been convicted of perjury, or a well-known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that any one who acted on that person's information deserved whatever happened to him. If the matter had been free from authority I should have thought that there was a great deal to be said for the proposition that the name of the informant was as relevant as the information which he gave, unless it could be said that there was sufficient public policy in allowing newspapers to make attacks on people without imposing any obligation on them to disclose the name of the person from whom the materials for those attacks were obtained to override what otherwise would seem to be a matter of principle. But it is said that the practice in the King's Bench Division has established a rule under which interrogatories such as these are not allowed in the case of libels in newspapers." He then analysed the authorities on the newspaper exception and summed up the position in these words (2): "I think that there is in these three decisions of the Court of Appeal, spread over a period of thirty years, a recognition of a settled rule of practice in the King's Bench Division applying to alleged libels published

(1) [1920] 1 K. B. 143.
(2) Ibid. 145.

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in newspapers, and not applying to alleged libels published elsewhere. Whatever I may personally think of the desirability or undesirability of such a rule, I do not think I am at liberty to depart from a rule of practice which has been acted upon for over thirty years and recognized in three judgments of this Court," and finally concluded his judgment by saying (1): "Therefore, feeling myself bound by the previous decisions of this Court, whatever my view might have been had I approached the question unfettered by authority, and finding nothing that I can see to be a special circumstance in any way weakening the effect of the rule, I agree that the appeal must be dismissed."

The two judgments in the *Lyle-Samuel* case (2) in my view cover the ground of the present appeal. They recognize the general rule of relevancy and they confine the exception to the special case of newspapers. I respectfully agree with both views; but in any case I should feel great difficulty in holding that we are not bound by those judgments.

The interrogatories allowed by the learned judge in the present case were clearly relevant and I can see no sufficient ground of principle for extending the rule of practice so as to bring the writer of a libellous letter in a newspaper within the umbrella of the newspaper, so as to give him the special and exceptional immunity conferred by the rule on the newspaper.

I therefore agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for defendant, appellant, Orum: *Shaen, Roscoe, Massey & Co.*

Solicitors for plaintiffs, respondents: *Haslewood, Hare & Co., for Aston, Harwood & San Garde, Manchester.*

Solicitors for the Croydon Advertiser, Ld.: *Gresham, Davies & Dallas.*

(1) [1920] 1 K. B. 146. (2) Ibid. 135.

J. R.

1937
July 26.

THE KING *v.* LICENSING JUSTICES FOR WISBECH, ISLE OF ELY.

Ex parte PAYNE.

Licensing—Permitted hours—Extension—Special requirements—Evidence —Licensing Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *s.* 1, *sub-s.* 1.

On an application to licensing justices for an extension from 10 P.M. to 10.30 P.M. of permitted hours under s. 1, sub-s. 1, of the Licensing Act, 1921, evidence was given that the main livelihood of the district was fruitgrowing and agriculture, and that in the summer months people were often at work in the fields until 10 P.M. :—

Held, that it was an essential part of the scheme of legislation with regard to permitted hours to call in and rely on the local justices to adjust and correct the general rule if they were satisfied that the special requirements of their district rendered it desirable, and that the evidence of the principal means of livelihood in the district entitled them to find special requirements in the present case.

RULE NISI for certiorari.

On March 6, 1937, the licensing justices for the Petty Sessional Division of Wisbech in the county of the Isle of Ely made an order under s. 1, sub-s. 1, of the Licensing Act, 1921 (1), directing that during the months of June, July and August that section should have effect as though "eight-and-a-half" were substituted for "eight" and "half past ten at night" were substituted for "ten at night."

The application for the order was made on behalf of the licensed victuallers in the district by the secretary of the Licensed Victuallers' Association. From the notes of the evidence made by the clerk to the justices it appeared that the applicant gave evidence that thirty-six out of forty licensed victuallers who had replied to a circular letter sent out by the association were in favour of the extension. The same witness said that the main livelihood of the district was fruit and agriculture. A grant of the application would be better for the licensed trade, and he thought there was a public need for an extension of permitted hours. In cross-examination the witness said: "I am asking because it is more comfortable for the trade."

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(1) The Licensing Act, 1921, s. 1, sub-s. 1 : "The hours during which intoxicating liquor may be sold or supplied on week days in any licensed premises or club, for consumption either on or off the premises, shall be as follows, that is to say : eight hours, beginning not earlier than eleven in the morning and ending not later than ten at night, with a break of at least two hours after twelve (noon) : Provided that— . . . . (*b*) the licensing justices for any licensing district outside the metropolis may by order, if satisfied that the special requirements of the district render it desirable, make, as respects their district, either or both of the following directions—(i.) that this provision shall have effect as though 'eight-and-a-half' were substituted for 'eight' and 'half past ten at night' were substituted for 'ten at night.'"

[(ii.) was not material to this case.]

Evidence was also given by a retired farmer, who had been in the district about forty-five years, that the principal trade was farming and fruitgrowing. "It is not so easy to get a drink at ten. If the extension were granted it would be better for them."

The application was opposed by Alderman John William Payne, of the Isle of Ely County Council and chairman of the Education Committee of the Council, a farmer and fruit-grower in the licensing district and a ratepayer there, on behalf of himself and 302 other objectors. The justices, however, made the order, and Mr. Payne obtained a rule nisi to bring it up and quash it on the ground that there was no evidence on which the justices could in law make the order.

Christmas Humphreys showing cause. There was evidence here on which the justices could act. Licensing justices, moreover, are entitled to have regard to the speeches of advocates, and to their own knowledge of the district as well as to the sworn evidence. They are not bound to require evidence to be given on oath. There appears to be no authority as to the meaning of "special requirements" under this section, but it is submitted that "special" is synonymous with "local" not with "unique."

Croom-Johnson K.C. and *Gerald Gardiner* in support of the rule. It cannot be argued that a requirement cannot be "special" merely because a similar requirement is found

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elsewhere in the country, but the evidence here shows that the application was mainly for the convenience of the licensed trade.

[LORD HEWART C.J. What greater " special requirement " can there be than one based on the particular means of livelihood in the district ?]

It amounts to no more than saying that there are a very large number of thirsty people.

[DU PARCQ J. Yes, thirsty at 10 P.M., because they have been working in the fields up to that hour, and unable to go to get a drink.]

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to be directed to the licensing justices of the county of the Isle of Ely Petty Sessional Division of Wisbech. The purpose of the rule, if it were successful, would be to quash an order made on March 6, 1937, with regard to licensed premises in that district under s. 1, sub-s. 1, of the Licensing Act, 1921, so as to substitute " eight-and-a-half " for " eight " and " half past ten at night " for " ten at night " during the months of June, July and August. The ground upon which it is alleged that that order was made without jurisdiction, or in excess of jurisdiction, is that there was, it is said, no evidence before the justices of any " special requirements of the district " within the meaning of s. 1, sub-s. 1, upon which the justices could exercise their discretion. That section of the Licensing Act, 1921, provides what the permitted hours on weekdays shall be. It lays down a general rule, but that general rule is subject to a two-fold proviso : first of all, with reference to the application of the provision within the metropolis; secondly, with regard to the application of the provision outside the metropolis. In the second case, which is the case here involved, the section provides that " the licensing justices for any licensing district outside the metropolis may by order, if satisfied that the special requirements of the district render it desirable, make as respects their district, either or both of " two directions, which are there set out.

It is quite obvious that the purpose of that enactment is to call in and rely upon the local justices, who, according to the Act, are to be satisfied that the special requirements of the district render the substitution of hours desirable. That, I think, is an essential part of the scheme of this legislation. There is a general rule, but that general rule is to be supplemented or corrected by elasticity based upon the judgment of local justices with regard to the special requirements of the particular locality.

It is said here that there was no evidence of anything which could properly be called "special requirements," but I am at a loss to see what better evidence there could have been. The matter is very carefully summed up by the chairman of the licensing justices himself in his affidavit sworn on June 25. Alderman Southwell, who is the mayor of Wisbech and chairman of the licensing justices in the county of the Isle of Ely Petty Sessional Division of Wisbech, says this: "In deciding the issue before them they"—that is the justices—"appreciated the necessity of satisfying themselves that the special requirements of the district rendered it desirable to make the requested change. They found as a matter of fact that the livelihood of the majority of the inhabitants of the division is obtained by fruitgrowing and agriculture, and that during the summer months in particular the said persons are kept working late in the fields, often as late as 10 P.M., in order to supply fresh fruit and vegetables for the markets on the following morning. They further found by a majority that if the licensed houses in the said division are closed at 10 P.M. unreasonable inconvenience during certain summer months is caused to those unable or unwilling to leave their work until that hour." That is the account of the matter which is given by the chairman of the justices.

There is appended to the affidavit of Mr. Payne what is evidently not a shorthand note, but a brief note of the evidence which was heard. Some criticism has been directed to passages of the evidence as contained in that note. In my opinion, upon a fair view of this evidence it amply bears out the conclusions expressed by the chairman of the justices. According to this note the secretary of the Licensed Victuallers' Association for that district said, among other things, that the main livelihood was fruit and agriculture, and a grant of the application would be better for the licensed trade and that there was a public need for an extension of the permitted hours. He went on to say, according to this note: "I am asking because it is more comfortable for the trade." Some stress has been laid upon that particular answer in cross-examination, but it is quite easy to perceive that the form of that answer may be due to the form of the question. The question may very well have been: "Why are you, the secretary of the Licensed Victuallers' Association, taking such a conspicuous interest in this matter?" and his answer is: "I am asking because it is more comfortable for the trade." But indeed I see no discrepancy between that which is comfortable for the trade and that which answers the public requirements. But his was not the only evidence. A retired farmer of the neighbourhood gave evidence and, among other things, he said this: "I have mixed with big employers of labour. I've been in this district about forty-five years. The principal trade is farming and fruitgrowing. It is not so easy to get a drink at ten. If the extension were granted it would be better for them."

In other words, here is a request for an alteration of hours based upon the habits of the people, which in their turn depend upon the nature of their main livelihood. If considerations of that kind cannot lead sensible justices to come to the conclusion that there are "special requirements," I do not know what can. Therefore, I am clearly of opinion that this rule ought to be discharged.

DU PARCQ J. I am of the same opinion, and for the same reasons.

HILBERY J. I agree.

Solicitors showing cause: *Godden, Holme & Ward, for Mellows & Sons, Peterborough.*

Solicitors supporting the rule: *Metcalfe, Copeman & Pettefar, Wisbech.*

J. W. H.

PAGET *v.* COMMISSIONERS OF INLAND REVENUE.

1937
June 14, 15;
July 30.

Revenue—Sur-tax—Bearer Bonds—Default in interest payments—Sale of coupons—Whether proceeds liable to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV.*

The appellant was the holder of bearer bonds of the City of Budapest. Interest payments in sterling in London were stopped by decree of the Hungarian Government, and the Municipality of Budapest was required to pay into the Hungarian National Bank an equivalent sum in pengos to the credit of a foreign creditors' fund, out of which holders might obtain payment of their interest coupons in pengos, subject to the proceeds being applied to certain purposes within Hungary.

The appellant was also the holder of certain dollar bearer bonds of the Kingdom of Yugoslavia. In respect of these bonds the Government of Yugoslavia suspended payment in dollars in New York, offering holders the option of payment in dinars in Belgrade, subject to restrictions on the use to which the dinars could be put, or payment of 10 per cent. in dollars, and the issue of funding bonds for the remainder.

The appellant did not avail herself of any of these options, but sold to agents, at a discount, the coupons of both sets of bonds as they fell due.

Held, as to both sets of bonds, that the proceeds of sale were not income arising to the appellant either under Case IV. of Sch. D or under Sch. C, and did not fall to be included in her total income for the purposes of assessment to sur-tax.

Case stated by the Special Commissioners of Income Tax.

At a meeting of the Special Commissioners on January 22, 1936, the Hon. Dorothy Wyndham Paget appealed against two assessments to sur-tax in respect of the years ending April 5, 1933, and April, 5, 1934. During those years Miss Paget was the holder of 4½ per cent. Bearer Bonds issued by the City of Budapest in the year 1914. The half-yearly interest coupons were payable in sterling in London, and in certain other countries in their respective currencies. By a decree dated December 22, 1931 (a translation of which was circulated to bondholders by the Department of Overseas Trade), the Royal Hungarian Government forbade the Municipality of the City of Budapest, while the decree remained in force (but without prejudice to the full rights of creditors after its expiry), to make payments of interest on the bonds to the creditors. The Municipality was directed to deposit with the Hungarian National Bank, as each payment fell due, the equivalent in pengos of the sum due. Provision was made for the formation of a foreign creditors' fund into which payments of pengos should be made, and for the control of the fund by the Hungarian National Bank. The decree was in force from December 23, 1931, to December 22, 1934.

After the decree came into force payment of interest coupons could be obtained in Hungary in pengos, but such payment could only be made out of the sums deposited by the City of Budapest pursuant to the decree to the credit of an account controlled by the Hungarian National Bank, and if required for certain specified purposes within Hungary. No such payment was obtained by Miss Paget.

A market existed in London for the sale of the interest coupons in question, and during the years of assessment ending April 5, 1933, and April 5, 1934, Miss Paget made sales of interest coupons through agents or coupon dealers in London amounting to 1172*l.* 10*s.* gross and 1554*l.* 7*s.* 8*d.* gross respectively. The purchasers deducted income tax from the proceeds of sale on payment to Miss Paget.

During the year of assessment ending April 5, 1934, Miss Paget was also the holder of 7 per cent. Bearer Bonds of the Kingdom of Yugoslavia issued in 1922, the half-yearly interest coupons being payable in American dollars in New York. On July 24, 1933, the government of Yugoslavia expressed to the bondholders its inability to pay interest on the bonds in full, and put before the bondholders a scheme for meeting the coupons falling due from November 1, 1932, to May 1, 1935, both dates inclusive, under which holders might accept either:

(*a*) a payment of each coupon in dinars in Belgrade, the disposal and use of such dinars to be governed by the general legislative or regulatory provisions of the Kingdom of Yugoslavia from time to time in force regarding transactions in moneys and foreign exchange; or

(*b*) the payment of 10 per cent. of the face value of each coupon in American dollars, and the issue of funding bonds for the remainder.

In September, 1933, Miss Paget sold the interest coupons of her bonds falling due for payment on November 1, 1932, and May 1, 1933, through agents or coupon dealers in London. The nominal amount of the coupons was $7000, and the amount realized on sale was $3587.50 or 760*l.* 1*s.* 3*d.* The coupon dealers deducted income tax from the proceeds of sale and the net amount was credited to Miss Paget's bank account in Montreal.

It was contended on behalf of Miss Paget: (*a*) That no interest arose to her from any of the bonds in either of the years of assessment: (i) as regarded the Budapest bonds, the deposit of pengos with the Hungarian National Bank by the Municipality was not payment to her; (ii) as regarded the Yugoslav bonds, Miss Paget had not accepted the offer of the Yugoslav government, and no payment was made by that government. (*b*) That the proceeds of the sales of coupons were not interest, but merely the price of the expectancy of interest, and were not income of Miss Paget. (*c*) That the proceeds of the sale of the coupons did not arise to Miss Paget from the bonds, but from contracts of sale. (*d*) That Miss Paget was not liable to pay or bear income tax on the proceeds of the sales of coupons under Sch. C or Sch. D or at all, and therefore such proceeds did not form part of her income for purposes of sur-tax.

It was contended on behalf of the Crown that the proceeds of the sale of the coupons were income and fell to be included in the assessments appealed against as income of Miss Paget.

The Commissioners gave the following decision in writing: "We hold that the 4½ per cent. City of Budapest bonds are instruments subject to Hungarian law, and capable of being affected by the decrees of the Hungarian Government. In our opinion the deposit of pengos with the Hungarian National Bank in accordance with the decree constituted performance by the municipality of its obligation to pay interest on the bonds, and the proceeds of the coupons falling due at the respective dates of deposit represent interest arising to the appellant and must be included in her return of total income for the purposes of sur-tax.

As regards the 7 per cent. bonds of the Kingdom of Yugoslavia, interest coupons of which fell due for payment on November 1, 1932, and May 1, 1933, we hold that there was default on the part of the Yugoslav government, and that the offer to pay in dinars, or partly in United States dollars and partly in funding bonds did not, in the absence of acceptance by Miss Paget and payment to her, constitute performance or satisfaction of its obligation. In our opinion the sale of the coupons did not amount to an implied acceptance of this offer, and the mere fact that the existence of the offer gave some value to the coupons in the market did not cause interest to arise. We therefore exclude this item from the assessments for the years 1932–33 and 1933–34."

Both parties appealed.

Latter K.C. and *F. Grant* for Miss Paget. No income arose to the taxpayer here. The proceeds of sale are not interest arising to the vendor from the bonds. That interest can arise only to the purchaser, if and when he obtains payment of the coupon, and on that payment tax will be exigible. But it is exigible only once in respect of each coupon. The purchase price is the price paid for the expectation of interest, and the fact that tax will be exigible on that interest if paid will affect the price paid by the purchaser, but that does not make it tax paid or deducted by the vendor.

As to the Budapest bonds, the deposit of pengos in the Hungarian National Bank was not payment to Miss Paget, for the bank were in no way her agents, but the agents of the Government, in exercising their control over the application of the foreign creditors' fund. That distinguishes the present case from *Simpson* v. *Executors of Bonner Maurice* (1), where the bank was the agent of the customer.

Sir Donald Somervell A.G. and *R. P. Hills* for the Crown. The Commissioners were right as to the Budapest bonds. The income arose to Miss Paget as soon as the money was deposited in the Hungarian National Bank to the credit of the foreign creditors' fund: *Simpson* v. *Executors of Bonner Maurice*. (1) They were wrong as to the Yugoslav bonds, for the coupons are "fruits," and it matters not whether those fruits are received directly or indirectly. What was sold was income, not capital, and the proceeds of sale are income.

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(1) (1929) 14 Tax Cas. 580.

Alternatively, an assessment might have been possible under Sch. C.

Cur. adv. vult.

1937. July 30. FINLAY J. [after reading the case, continued:] It is no doubt necessary to consider under what Schedule, if any, these things are taxable. I think, if anything, they were income from foreign securities under Case IV. of Sch. D. A suggestion was made that they might fall under Sch. C. I do not think that that suggestion is well founded; but some reliance was placed on r. 7 of the rules in that Schedule. That rule, as I think, is mere machinery and does not really help. The main question (and on this, I think, counsel were agreed) is whether these sums are income arising from the value of the securities. The word, it is worth noting, is "income" and not "interest." I shall consider whether that really matters later. Much of the argument before me, and also, judging from the decision, before the Commissioners, was on the question whether this was interest. The Commissioners' decision was, as I have already said, that there was interest in the first case but not in the second. I do not think that in the first case the Commissioners can be right. It seems to me that Mr. Latter's argument was correct, that the deposit of pengos in the Hungarian National Bank cannot be regarded as a payment of interest to Miss Paget. The Hungarian National Bank was in no sense an agent of Miss Paget to receive money on her behalf, and the case differs altogether, I think, from *Simpson* v. *Executors of Bonner Maurice* (1), where the German bank or banks concerned were the agents of Mr. Bonner Maurice or of the testator in that case and were duly authorized to receive money on his behalf. Here there is no authority whatever, either express or implied, from Miss Paget to the Hungarian National Bank to receive money on her behalf, and on that ground I think that the decision — obviously a very carefully considered decision—arrived at by the Special Commissioners on that matter was erroneous.

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(1) 14 Tax Cas. 580.

As regards the Yugoslav bonds, I agree with the conclusion of the Commissioners. I do not think that there was there a payment of interest to the appellant. An offer was made, which if it had been accepted would or might have resulted in payment to her, but she did not accept. I therefore think that in neither of these cases was there interest paid to or accepted by the appellant.

I desire to add that the view which I take, if right, concludes the matter. That view is that the sums which Miss Paget received were simply the purchase price of coupons and that in no sense, therefore, was there income from foreign securities. The matter is one of some difficulty, and various cases may no doubt be put. There is the simple case where a coupon is presented and interest received by the holder, and no one doubts there that there is income from a foreign possession, which may be interest, and that it is taxable. Equally so if a banker or other agent presents the coupon on behalf of the holder. But if coupons are sold and interest is then received by the purchaser I think there that it is a sale and purchase, and a receipt of interest by the purchaser only. The tax there, it seems to me, has to be borne by the purchaser by deduction, or by direct assessment, and the fact that the purchaser will have to bear tax will be reflected in the purchase price. He will consider, in deciding what he will pay for the coupon, that he has to bear tax on the interest when he receives it, but the tax is, of course, paid once and once only. It is paid, in the case I am putting, by the purchaser of the bond, and the fact that he will pay less for the coupon because he has to pay tax on the interest when he receives it does not cause the vendor of the coupon to bear tax. Another case may be put—an imaginary case. Suppose that three months before the due date coupons for two sets of bonds,

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Finlay J.

A and B, are sold, that the interest on A is paid three months later, and that the interest on B is not paid. It seems to me clear that in such a case the vendor receives the purchase price only. In the one case taxation arises because, and only because, interest is received, and the taxation is borne by the purchaser. In the other case, where the interest is not paid and there is a repudiation of liability, then there is no taxation because there is no interest received. The substance of the matter seems to me to be that if there is interest, wherever it is found, it is taxed. But if it is the purchase price of a coupon and not interest, then it is not liable to taxation. The interest will, of course, be liable to taxation if and when it is paid.

My conclusion, therefore, is that in the first case the Commissioners were wrong, because the payment in pengos to the Hungarian National Bank cannot constitute a receipt of interest by Miss Paget. In the second case I think that the Commissioners were right in finding that there was no receipt of interest. The result, therefore, is that the appeal of Miss Paget must be allowed, and the appeal of the Crown dismissed.

Appeal allowed ; cross-appeal of Crown dismissed.

Solicitors for appellant : *Allen & Overy.*
Solicitor for the Crown : *Solicitor of Inland Revenue.*

J. W. H.

1937
June 15;
July 30.

CROSS (INSPECTOR OF TAXES) *v.* LONDON AND PROVINCIAL TRUST, LIMITED.

Revenue—Income Tax—Bearer Bonds—Default in interest payments—Sale of coupons—Issue of Funding Bonds—Whether proceeds liable to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV.*

The respondent company was the holder of certain bearer bonds of the United States of Brazil. The Brazilian Government, being unable to pay the interest as it fell due, put forward a funding plan, under which holders might exchange their interest coupons as they fell due for 20-year funding bonds, carrying 5 per cent. interest. The appellant company exchanged their coupons for funding bonds, which they then sold:—

Held, that the value of the funding bonds at the date of issue was not "income arising" to the company from the original bonds, and that the company was not assessable to income tax under Case IV. of Sch. D in respect thereof.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Special Commissioners held on July 26, 1935, the London and Provincial Trust, Ld. ("the company") appealed against assessments made upon it under Sch. D for the years 1933–34 and 1934–35 by the Additional Commissioners for the City of London in respect of profits described as taxable under Case IV. of Sch. D of the Income Tax Acts.

The company held among its investments certain bonds issued in 1926 by the United States of Brazil. The bonds were issued in denominations of $500 and $1000, and were described as "6½ per cent. External Sinking Fund Gold Bonds of 1926," and were due for repayment on October 1, 1957. The interest coupons were payable half-yearly in United States dollars on April 1 and October 1.

Early in 1932 the Brazilian Government gave notice that it was suspending payment of interest on these and other bonds. A circular dated March 14, 1932, relating to these dollar bonds and others was issued by Messrs. Rothschild and Sons in London, acting on behalf of the Brazilian Government, headed "United States of Brazil Funding Plan," from which the following are extracts:—

"The Government of the United States of Brazil has found itself compelled to suspend the payment of interest and sinking fund on the loans mentioned below. It has therefore decided to fund the interest payable on these loans during a period not exceeding three years. . . . . The Minister of Finance . . . . has authorised the issue for this purpose of two series of funding bonds to be called 'United States of Brazil 5 per cent. 20-year Funding Bonds of 1931,' and 'United States of Brazil 5 per cent. 40-year Funding Bonds of 1931' respectively. The 20-year bonds will be divided into sterling, U.S. dollar, and French franc tranches, and the 40-year bonds into sterling and French franc tranches, each tranche of each series being secured by a separate general bond. (Particulars were given as to the total amounts and issuing houses of the several tranches, and a table was appended setting out the loans to which the funding plan applied. Part I. of the table included the 6½ per cent. External Sinking Fund Gold Bonds of 1926, the suspended coupons being those from April 1932 to October 1934 inclusive.)

"Sterling, dollar and franc coupons mentioned in Part I. of the above table may be exchanged, when and as they mature, for an equal amount of the 20-year bonds of the appropriate tranche. . . . . Each series of bonds will carry interest at 5 per cent. per annum. Interest will be payable half-yearly on April 1 and October 1 in every year. All the bonds will be payable to bearer. The dollar bonds will be issued in bonds of $1000, $500 and $100.

"The following are the conditions to be observed by holders of bonds of the suspended sterling loans for the funding of coupons: [These conditions were in fact applied to the dollar loans as well, though in terms applying only to the sterling loans.] (*a*) Coupons to which the funding plan applies may be presented for funding at the offices . . . . at which such coupons are payable, on dates of which notice will be given by advertisement in the usual manner. (*b*) In exchange for coupons holders will receive receipts for the amount lodged. (*c*) These receipts will be exchangeable for scrip, which will be afterwards exchangeable for bonds of the appropriate series."

The company thereafter surrendered the coupons of its 1926 bonds as they fell due in accordance with the conditions printed in the circular, and in due course received funding bonds for the coupons surrendered. The company from time to time sold the funding bonds which it so received, and it was admitted that they were of marketable value when received. The revenue accounts of the company for the years 1932–33 and 1933–34 included sums respectively representing proceeds of sale of the funding bonds. The assessments under appeal were made as under Case IV. of Sch. D to include the value of the funding bonds at the time of issue. No question of amount arose.

It was contended for the company that no payment of any kind had been made by the Brazilian Government and that no income had arisen to the company within the meaning of Case IV. of Sch. D.

It was contended for the Inspector of Taxes that the funding bonds issued by the Brazilian Government represented money or money's worth; that they were received in satisfaction of interest due from that Government and were income arising from securities within the meaning of Case IV. of Sch. D. *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (1) was referred to.

The Special Commissioners gave their decision as follows: "We do not think that *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (1) affords us guidance. Apart from the fact that the assessment in that case was under Case I. of Sch. D, the 'payment' of interest was made in securities of another company. The present assessments are defended under Case IV. of Sch. D. To satisfy that case there must be income arising abroad. There clearly has been no payment of *interest* by the Brazilian Government out of its public revenue to use the words appropriate to Sch. C (under which the assessment would then fall to be made) and we are unable, after considering all the facts, to see that there has been any payment of *income* from abroad at all within the scope of Case IV. All that has been done is that the appellant, being the owner of coupons which are unpaid, has received a bond bearing interest for the amount unpaid, and we cannot regard this transaction as income arising from securities abroad within Case IV. We express no opinion on this appeal as to the possibility of assessments under other cases of Sch. D. We accordingly discharge the assessments."

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(1) 1922 S. C. 242; 8 Tax Cas. 265.

The Inspector of Taxes appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The funding bonds here were the equivalent of income arising from the original bonds, and it matters not for taxation purposes whether income is received in money or money's worth: *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (1); *Weight* v. *Salmon.* (2) The funding bond, though looking like capital, is income if accepted in satisfaction of interest. So here the value of these bonds was income arising to the company within Case IV. of Sch. D.

A. M. Latter K.C. and *J. S. Scrimgeour* for the company. In order that income may arise from the original bonds there must be a payment of interest. Here there was no payment of interest, but only a further promise to pay in the future, which is not enough: see *Commissioner of Income Tax* v. *Maharajadhiraja of Darbhanga.* (3) In order that a payment in kind may be income it must be the equivalent of cash, but the funding bonds were not the equivalent of cash.

Scottish and Canadian General Investment Co., Ld. v. *Easson* (1) was a case of business profits, and has no application to the present case.

Cur. adv. vult.

1937. July 30. FINLAY J. [after reading the case continued:] This case, like *Paget* v. *Commissioners of Inland Revenue* (4),

(1) 1922 S. C. 242; 8 Tax Cas. 265.
(2) (1935) 19 Tax Cas. 174.
(3) [1933] L. R. 60 I. A. 146, 161.
(4) Ante, p. 711.

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which I have just been considering, depends to a large extent on Case IV. of Sch. D: "Tax in respect of income arising from securities in any place out of the United Kingdom." Two cases were referred to before me. In *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (1), a company, as the headnote in the report in Tax Cases states: "held certain 5 per cent. mortgage bonds of the Western Canada Power Company, Ld. That company was unable to meet the coupons which fell due for payment on January 1, 1916, in respect of the interest on the bonds for the half-year from July 1, 1915. A reorganization of the finance of the company, involving the formation of a new company, then took place and the appellant company surrendered its holding of bonds of the old company, with the unpaid coupons attached, and received in exchange 5 per cent. bonds of the new company of equivalent face value, bearing interest from July 1, 1917, together with an issue of 10-year 7 per cent. debentures of the new company, equal in face value to 10 per cent. of the face value of the surrendered bonds. The 7 per cent. debentures issued to the appellant company under this arrangement were thus exactly equivalent in face value to the amount of the coupons for the two years' interest from July 1, 1915, to July 1, 1917, which had been surrendered with the bonds of the old company, but in the scheme of reorganization it was not expressly stated that these debentures were in satisfaction of the arrears of interest. In computing for the purposes of assessment to income tax, Sch. D, the profits of the appellant company for the year during which it had received the 7 per cent. debentures, a sum equal to 75 per cent. of the face value of those debentures, as representing their actual value at the time of receipt by the company, had been included as interest received. *Held*, that the Commissioners had evidence before them sufficient to enable them to arrive at their determination that the 7 per cent. debentures represented the two years' interest coupons which had been surrendered with the old bonds, that the value of the debentures had therefore been properly included in the computation of the company's profits, and that, as objection had not been raised upon the appeal to the basis adopted in valuing the debentures, the Court had no material upon which to question the Commissioners' finding that 75 per cent. of the face value of the debentures fairly represented the profit of the appellant company."

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(1) 1922 S. C. 242; 8 Tax Cas. 265.

The question in that case was considered in the Inner House by the Lord President (Lord Clyde), and the substance of his view comes to this (1): "The question becomes one of ascertaining the amount of the profits and gains of the company. If, instead of receiving cash for the coupons on the old bonds the company got a saleable security, that saleable security is just part and parcel of the company's profits and gains." For myself I do not question for a moment that general principle. I think that if by way of profit, instead of receiving money one receives money's worth, that money's worth is to be regarded as money and falls to be brought in for purposes of assessment. That is really what was decided in that case.

The second case referred to before me was *Commissioner of Income Tax* v. *Maharajadhiraja of Darbhanga.* (2) Lord Macmillan delivered the decision of the Privy Council, and one point which he considered has some bearing on the question which I have to consider, because there a question arose whether certain promissory notes were or were not to be regarded as income. Lord Macmillan said: "The Commissioner's opinion was that the transaction when rightly viewed amounted to the acceptance by the assessee from his debtor, in lieu and satisfaction of the capital and interest due to him, of assets and securities prima facie worth the valuation put upon them, and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly. There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be

(1) 1922 S. C. 242, 246; 8 Tax Cas. 265, 271.
(2) L. R. 60 I. A. 146, 161.

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taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth : *Californian Copper Syndicate* v. *Harris* (1) ; *Scottish and Canadian General Investment Co., Ld.* v. *Easson.* (2) Now here the first six items, amounting to Rs.20,74,973, may perhaps reasonably enough be regarded as the equivalent of cash, but the seventh item of Rs.17,34,596, consisting of the debtor's own promissory notes was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor ; he merely gives him a document or voucher of debt possessing certain legal attributes. So far, then, as this item of Rs.17,34,596, is concerned, the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all. In so holding their Lordships find themselves in agreement with the learned judges of the High Court who differed on this point from the commissioner."

There is no doubt at all in the present case that these bonds were things of value, as is shown by the fact that they were things which could be sold and in fact were sold in the market. The question does not seem to be, on the case before me, whether the bonds were things of value. The question is whether there was anything analogous to interest. A person receiving the bonds in these circumstances is not, I think, receiving interest, or indeed receiving income. The whole point seems to me to be that Brazil, unfortunately, was unable to pay interest, and so evolved this scheme of issuing these bonds. From the point of view of the recipient, the result of the transaction was that he received, instead of interest, a capital asset. That capital asset, if the obligations under it were duly fulfilled, would itself produce income and would result in income, which, if and when it were received, would be liable to tax. I do not think that it can be said (and in this I agree with the Commissioners) that here there is a receipt of interest or a receipt of any income under Case IV.

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(1) (1904) 6 F. 894 ; 5 Tax Cas. 159.

(2) 1922 S. C. 242 ; 8 Tax Cas. 265.

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The whole point is that there was not income and that the capital asset was, so to speak, substituted for the income. I cannot regard this as being a payment of an equivalent of interest, a payment of interest in kind, so as to fall within the decision in *Scottish and Canadian General Investment Co., Ld.* v. *Easson.* (1)

I have arrived at the conclusion that the view taken by the Commissioners in the present case was correct. The appeal therefore fails and is dismissed, with costs.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the respondents: *Linklaters & Paines.*

(1) 1922 S. C. 242; 8 Tax Cas. 265.

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